No. 91-1030-CFH
Status: GRANTED

Title: Pamela Withrow, Petitioner
v.
Robert Allen Williams, Jr.

Docketed:
December 12, 1991

Court: United States Court of Appeals for the Sixth Circuit

Counsel for petitioner: Baughman,Timothy A., Caminsky,Jeffrey

Counsel for respondent: O'Neil,Daniel P., Waxman,Seth P.

Entry	Date	Note	Proceedings and Orders
1	Dec 12 1991	G	Petition for writ of certiorari filed.
2	Jan 15 1992		DISTRIBUTED. February 21, 1992
3	Feb 19 1992	P	Response requested -- WHR. (Due March 19, 1992)
4	Mar 18 1992		Brief of respondent Robert Williams in opposition filed.
5	Mar 18 1992	G	Motion of respondent for leave to proceed in forma pauperis filed.
6	Mar 25 1992		REDISTRIBUTED. April 17, 1992
7	Apr 20 1992		Motion of respondent for leave to proceed in forma pauperis GRANTED.
8	Apr 20 1992		Petition GRANTED.
			**********
9	May 20 1992	G	Motion of respondent for appointment of counsel filed.
14	May 29 1992		Brief amici curiae of Americans for Effective Law Enforcement, et al. filed.
12	Jun 3 1992		Order extending time to file brief of petitioner on the merits until June 11, 1992.
15	Jun 3 1992		Brief amicus curiae of The Criminal Justice Legal Foundation filed.
13	Jun 4 1992		Brief amici curiae of California, et al. filed.
16	Jun 8 1992		DISTRIBUTED. June 12, 1992 (Appt. of counsel)
17	Jun 11 1992		Record filed.
		*	Original proceedings U.S. District Court, Eastern District of Michigan(Including 1 Video tape, 3 cassettes) BOX
19	Jun 11 1992		Brief amicus curiae of United States filed.
20	Jun 11 1992		Joint appendix filed.
21	Jun 11 1992		Brief of petitioner Pamela Withrow filed.
18	Jun 15 1992		Motion for appointment of counsel GRANTED and it is ordered that Seth P. Waxman, Esquire, of Washington, D. C., is appointed to serve as counsel for the respondent in this case.
22	Jun 16 1992		Record filed.
		*	Partial proceedings U. S. Court of Appeals for the SixthCircuit.
27	Jun 23 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
26	Jul 8 1992		Order extending time to file brief of respondent on the merits until July 31, 1992.
29	Jul 30 1992		Brief amici curiae of American Civil Liberties Union, et al. filed.

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Entry	Date	Note	Proceedings and Orders
28	Jul 31 1992		Brief amicus curiae of American Bar Association filed.
35	Jul 31 1992		Brief amici curiae of Police Foundation, et al. filed.
30	Aug 13 1992		Brief of respondent Robert Williams filed.
31	Aug 17 1992		CIRCULATED.
32	Aug 21 1992		SET FOR ARGUMENT TUESDAY, NOVEMBER 3, 1992. (2ND CASE).
34	Aug 31 1992	X	Reply brief of petitioner filed.
33	Sep 4 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
36	Oct 29 1992		Errata letter from Solicitor General received and distributed.
37	Nov 3 1992		ARGUED.

No. 91-1030

Supreme Court, U.S.
FILED
DEC 12 1991
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PAMELA WITHROW,

Petitioner,

vs

ROBERT ALLEN WILLIAMS, JR.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

DO THE FEDERAL COURTS ON HABEAS CORPUS REVIEW OF A STATE COURT CONVICTION HAVE JURISDICTION TO FIND A PETITIONER'S STATEMENT INVOLUNTARY WHERE THE ONLY FIFTH AMENDMENT ISSUE RAISED IN THE STATE COURT, AND IN THE HABEAS PETITION, WAS WHETHER THE STATEMENT WAS ADMITTED IN VIOLATION OF THE PROPHYLACTIC MIRANDA RULES, THE STATE HAVING FOUND THAT THE PETITIONER WAS NOT IN CUSTODY?

IF SO, WHERE THE PREMISE OF THE FIFTH AMENDMENT RULING IS A FINDING OF A MIRANDA VIOLATION, WHERE THE PETITIONER HAS HAD ONE FULL AND FAIR OPPORTUNITY TO RAISE THE MIRANDA CLAIM IN STATE COURT, SHOULD COLLATERAL REVIEW OF THE SAME CLAIM ON A HABEAS CORPUS PETITION BE PRECLUDED?

IF NOT, IS A CONFESSION WHICH FOLLOWS MIRANDA WARNINGS INVOLUNTARY MERELY BECAUSE THE POLICE INDICATE THE POSSIBILITY OF LENIENT TREATMENT IF THE ACCUSED TELLS THEM THE TRUTH; AND IF SO, WOULD ADOPTION OF SUCH A RULE ON HABEAS CORPUS VIOLATE THE PRINCIPLES OF SAWYER V SMITH, ___ US ___; 110 S Ct 2822 (1990) AND TEAGUE V LANE, 489 US 288 (1989)?

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IN THE SUPREME COURT OF
THE UNITED STATES
OCTOBER TERM, 1991

PAMELA WITHROW,

Petitioner,

vs.

ROBERT ALLEN WILLIAMS, Jr.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

NOW COMES the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, Timothy A. Baughman, Chief of Research, Training and Appeals, and Jeffrey Caminsky, Assistant Prosecuting Attorney, and pray that a Writ of Certiorari issue to review the judgment of the Sixth Circuit Court of Appeals of the United States of America, entered in this cause on September 11, 1991, rehearing denied on October 3, 1991, judgment entered on October 11, 1991.

OPINIONS BELOW

The Opinion of the Michigan Court of Appeals is reported at 171 Mich App 234; 429 NW2d 649 (1990), and appended below as Appendix F; the order of the Michigan Supreme Court denying Respondent leave to appeal is reported at 432 Mich 911 (1990); the order of this Court denying a Petition for writ of certiorari is reported at ___ US ___; 110 S Ct 369 (1989); the order of the District Court granting the Petition for writ of habeas corpus is unreported as yet, and appended below as Appendix D; the opinion of the Sixth Circuit Court of Appeals affirming issuance of the writ is unreported as yet, and appended below as Appendix A; the order of the Sixth Circuit denying rehearing is unreported, and appended below as Appendix B; the Judgment of the Sixth Circuit is unreported, and appended below as Appendix C.

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appealas issued its opinion on September 11, 1991, denied rehearing on October 3, 1991, and entered judgment on October 11, 1991. This Court's jurisdiction is invoked under 28 USC 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V to the United States Constitution provides, in pertinent part:

> "No person shall...be compelled in any criminal case to be a witness against himself...."

Amendment XIV to the United States Constitution provides, in pertinent part:

> "...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On October 29, 1985, following a bench trial, the state trial court convicted Respondent of two counts of first-degree murder, and two counts of felony firearm. On November 6, 1985, the court sentenced Respondent to two concurrent terms of life imprisonment for murder, and two consecutive terms of two years imprisonment for felony firearm. On December 18, 1986, following an evidentiary hearing, the trial court vacated one felony firearm count, and denied Petitioner's motion for new trial.

On September 7, 1988, the Michigan Court of Appeals affirmed Respondent's convictions in a published opinion. 171 Mich App 234; 429 NW2d 649 (1988). Respondent had raised three issues in the appeal: a constitutional claim that the police had failed to give him Miranda

warnings; ineffective assistance of counsel; and the adequacy of the trial court's fact findings. On June 9, 1989, the Michigan Supreme Court denied Respondent leave to appeal; Respondent had raised only the Miranda and ineffectiveness issues in this application. Docket No. 84294, 432 Mich 911 (1989). On November 9, 1989, this Court denied Respondent's petition for writ of certiorari. Docket No. 89-5191, cert den ___ US ___; 110 S Ct 369; 107 L Ed 2d 355 (1989). Petitioner had raised only the Miranda issue in his petition.

On or about December 7, 1989, Petitioner filed the instant petition for writ of habeas corpus with the District Court. Docket No. 90CV-70256-DT. Respondent claimed three grounds for issuing the writ: a violation of his Miranda rights; a claim that counsel was ineffective for failing to discuss plea bargain offers with him prior to trial; and inadequate fact

findings by the trial court. On October 29, 1990, the District Court issued an order, supported by a 33-page written opinion, ordering Respondent's conviction reversed on the following grounds: (1) the state trial court erred in holding that Respondent was not in police custody during his initial statement to police, and that Miranda warnings were therefore not required; and (2) his subsequent statements to police, though preceded by Miranda warnings, were coerced through promises of leniency and were involuntary. The District Judge held that the admission of these involuntary statements into evidence at trial required the reversal of Respondent's conviction. The Distict Court entertained no argument before issuing its ruling, and conducted no independent evidentiary hearing. However, the court appeared to base its conclusion on passages cited in two audiotapes, labelled "Rights in Office," Appendix, xxa (Slip

Opinion, p 19), and "Video," Appendix, xxa (Slip Opinion, pp22-23). These two tapes comprised what the District Court described as the "second interrogation session," following the recitation of Miranda warnings, and formed what the District Court called the "critical question" in the case." Appendix, xxa (Slip Opinion, pp 20). Although finding the evidence against Respondent "substantial," the District Court determined that the admission into evidence of the statements was not "harmless beyond a reasnoable doubt." __a; (Dist Ct Slip Opinion, pp 24-27, 32).

The state court record of the proceedings discloses the following:

Following an evidentiary hearing, and in a written opinion issued on September 27, 1985, the state trial court granted Respondent's motion to suppress his latter two statements, holding that the police did

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not have probable cause to arrest him following his initial statement, and that holding him in jail rendered his subsequent statements inadmissible on Fourth Amendment grounds. Concerning the initial statement, and the two statements ordered suppressed, the trial court made the following relevant findings of fact:

> "Romulus police officers investigating two apparent murders heard that Defendant might have information about the decedents. They were admitted to Defendant's house by his mother on April 10. He was searched but not handcuffed, and asked to come to the police station for questioning. He was not placed under arrest, but agreed to come with them and to answer questions. After approximately 40 minutes of questioning at the police station, Defendant began to implicate himself. He waived his rights and the questioning continued. He was questioned a second time on April 10, after Miranda warnings and his waiver of rights. Defendant was then lodged in jail. He was given a polygraph examination and questioned a second time on April 11. He was questioned again on the morning of April 12, and was arraigned that afternoon."

The trial court record shows that defense counsel requested that the court listen to the tape of Respondent's statement at trial, and suggested playing the tape in its entirety. The single audiotape, comprising Plaintiff's Exhibit #10, was of Respondent's initial statement to police, on April 10th, and was the only statement of Respondent's admitted at trial. While it is unclear from the existing record, it appears that this tape consisted of the initial, pre-Miranda statement, and the post-Miranda statement of April 10th; no reference is found on the trial court record to the existence of a second audiotape.

On appeal, the Sixth Circuit affirmed the issuance of the writ. While acknowledging that the district court's opinion "inexplicably does not mention that the April 11 and 12 statements had already been excluded by the state trial court," the Circuit Court held that "our conclusion that

the inculpatory statements made on April 10 should have been excluded still mandates a new trial," approving of the District Court's finding "that the admission of the April 10 statements was not harmless error." The Circuit Court did not note that District Court's harmless error analysis appeared to be directed largely to those statements, outside of Plaintiff's Exhibit #10, which were not admitted into evidence at Respondent's trial.[1]

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[1] See Opinion of the District Court, xxa n 8 -- noting the second tape from April 10 and concluding, in the absence of an evidentiary hearing, that "[a]lthough it has been given a different title and is on a separate tape it should probably be considered a continuation of the same interrogation session recorded on the 'Rights in Office' tape" and noting that "[a]lthough the tape is labelled 'Video,' it does not follow the interrogation session recorded on videotape. The videotaped session is dated April 12, 1985."

The only tape admitted at trial was Exhibit 10. However, in the absence of

Petitioner now seeks certiorari.

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[1] Continued
an evidentiary hearing, Petitioner is at a loss to explain -- or to dispute -- how the lower courts have all based their determination of reversible error of material contained in the other tapes. And in the absence of a testimonial record on the question of voluntariness, Petitioner will not speculate upon the existence of other evidence relating to Respondent's reasons or motivation for making his April 10th statement.

REASONS FOR GRANTING THE WRIT

As this Court will note from a review of the opinion and appendix, this case is not a textbook example of jurisprudence at its finest: though feeling an "inevitable and understandable reluctance," __a, to order a new trial, and despite "substantial" evidence at trial, __a, the district judge failed to notice that two of the three confessions mentioned in her opinion as leading her to grant a new trial were never introduced into evidence; the Circuit Court of Appeals, though noting that the district court's opinion on this point "inexplicably" overlooks this point, took Petitioner's concession about exhaustion on a Miranda issue to be a concession on a voluntariness issue; and, neglecting to note that the question of voluntariness had never been the subject of an evidentiary hearing, that Court proceeded to affirm on grounds that the police offer to release Respondent if he

was telling the truth and passed a polygraph was "intended to induce [Respondent]'s admissions," __a, and rendered the admission involuntary. Thus, the Court reasoned, as involuntary statements are not admissible under this Court's holding in Oregon v Elstad, 470 US 298; 105 S ct 1285; 84 L Ed 2d 222 (1985) by the mere recitation of Miranda warnings, and the trial court committed "no error in the district court's grant" of the petition. __a. Slip Opinion, p 1.

Ordinarily, such mistakes by a lower court on direct review -- even those leading to the gratuitious release of a convicted murderer -- may well be of little interest to this Court, as they involve isolated errors in applying otherwise clearly defined rules. However, the mistakes in this case, which occurred on collateral attack of a state court conviction which had been thoroughly reviewed by the state judiciary,

are symptomatic of a larger problem in our criminal justice system: the widespread and growing nature of federal involvement in state court criminal proceedings. Petitioner suggests that this case provides a classic vehicle for the Court to review three vital areas of federal habeas corpus practice, and intervene in three areas of critical importance to American criminal jurisprudence:

A.

AN ISSUE IS NOT "FULLY AND FAIRLY" PRESENTED FOR STATE COURT REVIEW AND DECISION WHEN THE DECISIVE ASPECT OF THE ISSUE IS RAISED NEITHER IN STATE COURT NOR IN A PETITION FOR COLLATERAL RELIEF, BUT IS FIRST RAISED IN THE DISTRICT COURT'S OPINION GRANTING FEDERAL HABEAS RELIEF.

It is well settled that federal courts have no supervisory power over state courts, and that considerations of comity and finality preclude federal intrusion into

state judicial proceedings except when necessary to correct wrongs of constitutional dimension. Harris v Rivera, ___ US ___; 102 S Ct 460; 70 L Ed 2d 530 (1981). In addition, this Court has clearly held that before presenting such a claim to the federal courts, a state court defendant must first afford the state a "fair opportunity" to apply the controlling legal principles involved in the substance of his habeas claim. Anderson v Harless, 459 US 4, 6-8; 103 S Ct 276; 74 L Ed 2d 31 (1982); Picard v Connor, 404 US 270, 276-277; 92 S Ct 509; 30 L Ed 2d 438 (1971).

In this case, despite the Sixth Circuit's langauge to the contrary, Respondent has never conceded that any Fifth Amendment issue of voluntariness was ever presented: rather, Respondent conceded only that the Fifth Amendment claim relating to the Miranda issue was presented to the state court for resolution. And, in point of

fact, the record discloses that the only challenge to the statements ever presented in state court were challenges premised on Miranda, which was denied,[2] and the Fourth Amendment, which was sustained. Voluntariness was neither contested nor raised as an issue in the state court -- and, Petitioner was never on notice that voluntariness would be an issue, until the district court issued its opinion granting the writ.

Accordingly, it is clear that the ground relied upon by the District Court and Sixth Circuit to justify overturning

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[2] With due respect to the lower courts, Petitioner is also at a loss to explain how the District Court could accord the presumption of correctness to a written opinion that it neither cited nor acknowledged in its opinion -- and which would have informed that court that two of the three "improperly admitted" confessions relied upon as grounds for overturning Respondents first-degree murder convictions were already suppressed on other grounds. Cf, Sumner v Mata, 455 US 591; 102 S Ct 1303; 71 L Ed 2d 480 (1982).

Respondent's conviction was not properly before the Court. While such a clear error in the application of clear legal principles might not justify this Court's attention, it matters a great deal to the State of Michigan, and Petitioner hopes that this Court will not be tempted to overlook its supervisory responsibilities simply because of the blatancy of the lower courts' mistake. Therefore, Petitioner requests this Court's intervention, to correct a clear mistake by the Sixth Circuit.

Even so, this mistake is not the only reason this particular case might warrant the Court's attention. If we delve beyond the District Court's threshhold error in reviewing a claim never presented to any court, there are two additional aspects of this case that make it an appropriate vehicle for exploring the parameters of habeas corpus review.

B.

THIS COURT SHOULD APPLY THE RULE IN STONE V POWELL, 428 US 465 (1976) TO CLAIMED VIOLATIONS OF THE FIFTH AMENDMENT.

Secondly, though the Sixth Circuit summarily dismissed the point, the fact remains that Respondent has already had the opportunity, and the occasion, to have full review of the federal issues presented on direct appeal: in Williams v Michigan, ___ US ___; 110 S Ct 369; 107 L Ed 2d 355 (1989), following his state court appeals, this Court denied Respondent's petition for writ of certiorari, in which he raised the federal aspects of his direct appeal. For the entire federal court system to litigate this point anew is a waste of judicial resources; and as the federal district judge was the first to find any fault with the findings or procedures of the State courts -- after review by eleven state court judges, and the nine Justices of this Court

-- it is an illustration of why the existing method of federal review is in dire need of revision.

In Stone v Powell, 428 US 465; 96 S Ct 3037; 49 L Ed 2d 1067 (1976), this Court confronted a similar problem: in the context of Fourth Amendment claims, the Court held that collateral relief, by way of federal habeas proceedings, was unavailable to those state court criminal defendants wishing to raise Fouth Amendment claims, where those defendants have had a full and fair opportunity to raise those claims in the state court proceedings. Plaintiff urges that this Court consider applying a similar rule in this case, and suggests that this case provides a classic example of the need for such a rule: federal judicial resources are no less valuable than those of the state -- and federal courts are just as likely to blunder. Moreover, the mistakes involved in federal adjudication of this

matter should give pause to those who claim that federal courts are needed to protect state prisoners from the abuses of their own state government.

In this case, eleven state court judges, and the nine justices of this Court, all declined to disturb the trial court's determination that Defendant was not "in custody" for purposes of Miranda until the police formally advised Respondent of his constitutional rights. In the absence of a demonstration of the manner in which the State prevented Respondent from litigating the point once, this Court should not permit him a second chance to contest the matter. Applying a Stone v Powell-rule to Fifth Amendment determinations would go a long way toward streamlining the already cumbersome procedures for incarcerating criminals in this country -- without sacrificing the principle of appellate review, which remains our primary safeguard against unjust or

unlawful imprisonment. And it would go equally far toward repairing the converse danger -- the eroding ability of government to impose a modicum of law and order upon our streets.

Two members of this Court have already indicated an interest in examining the application of Stone v Powell, supra to cases involving the Fifth Amendment.[3]

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[3] At the risk of confusing the Court, Petitioner will attempt to duplicate the reasoning by which the lower courts converted a legitimately-raised Miranda claim into a never-litigated voluntariness claim:

> Though Respondent did not raise a voluntariness challenge to the introduction of his statement, he did raise a Miranda challenge, which the court rejected. Given the fact that the district court reached a different result on the Miranda challenge, the district judge had to consider the impact of this Court's holding in Oregon v Elstad, 470 US 298; 105 S Ct 1285; 84 L Ed 2d 222 (1985), holding that giving Miranda-warnings cured any Miranda defect, and would not taint a subsequent statement which merely reiterated a Miranda-defective

See, Duckworth v Eagan, 492 US 195; 109 S Ct 2875; 106 L Ed 2d 166 (1989)(O'Connor, J, concurring). See also, Robinson v Borg, 918 F2d 1387, 1402-1404 (CA 9, 1990(Trott, J, dissenting). Petitioner suggests that the time is ripe for the full Court to consider such a rule.

C.

A CONFESSION IS NOT INVOLUNTARY MERELY BECAUSE INDUCED BY THE POSSIBILITY OF FUTURE LENIENCY; AND RELIEF ON SUCH GROUNDS IS PRECLUDED ON COLLATERAL REVIEW UNDER TEAGUE v LANE, 489 US 288 (1989) and SAWYER v SMITH, ___ US ___; 110 S Ct 2822 (1990).

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[3] Continued
confession. However, Elstad has no application to subsequent involuntary statements; and therefore, giving tardy Miranda warnings to Respondent did not cure the original error, and did not render the subsequent statement admissible.

Though there may well be a reason for distinguishing between Fifth Amendment voluntariness claims, and

Lastly, the major premise of the lower courts is that Respondent's statements to police were involuntary. Specifically, the Sixth Circuit[4] noted that the one statement actually introduced into evidence

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[3] Continued
Fifth Amendment Miranda claims for purposes of asserting a Stone v Powell rule on collateral attack, this Court may address the point during plenary review -- and, if necessary, remand the cause to the District Court for an inquiry into whether Respondent fully and fairly raised the voluntariness portion of his Fifth Amendment claim to the state courts.

[4] Though difficult to discern upon a first reading, the precise reasoning of the lower courts appears to be as follows: the state court erred in determining that Respondent was not in custody before he was given Miranda warnings, and that such warnings actually were required a few minutes earlier -- when, after telling Respondent that they thought he was at the scene of the crime but that were interested in finding the shooter, the interrogating officer confronted Respondent with the following choice: "[Y]ou can talk about it now and give us the truth and we're gonna check it out and see if it fits or else we're simply gonna charge you and lock you up and you can just tell it to a defense attorney and let him try and prove

came after the police had told Respondent that if he was telling them the truth, was not involved in the shooting, and passed a polygraph to confirm his innocence, he would not be charged with the crime -- and found such a representation to be "objectively coercive police activity...sufficient to overbear the will of the accused." __a

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[4] Continued
differently." --a; --a. (District Court Slip Opinion, p 11; 6th Circ. Slip Opinion, p 8).

Noting the holding in Oregon v Elstad, 470 US 298; 105 S Ct 1285; 84 L Ed 2d 222 (1985), the District Court held Elstad to be inapposite because the ensuing statement in that case was voluntary, while the statement in this case was involuntary because it was induced by the police promise that -- if Respondent was telling them the truth, and passed a polygraph test -- he would not be charged with the homicide, since he would not be the shooter. __a; __a (District Court Slip Opinion, pp 19-20; 6th Circuit Slip Opinion, pp 9-10). Respondent then admitted to being present at the scene -- and, in several subsequent statements, later held inadmissible on Fourth Amendment grounds, made further damaging admissions.

(Slip Opinion, p 10), citing McCall v Dutton, 863 F2d 454, 459 (CA 6, 1989) cert den 490 US 1020 (1989).

Such a holding appears to conflict with the common-sense notion that, in the absence of an assertion of the Fifth Amendment right to cut off questioning, the police have every right to try to convince someone to speak to them. See, eg, Grano, Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confession Law, 84 Mich L Rev 662, 666 (1986). And if we survey the holdings of other jurisdictions, we find little support for such a proposition.

Generally, courts look not to the bare language of the inducement, but to the nature of the benefit to be derived if the defendant chooses to speak, to determine questions of voluntariness. People v Johns, 145 Cal App 3d 281; 193 Cal Rptr 182 (1983).

A mere promise that a purported informant will be "taken care of," in the absence of a more concrete understanding, will not support a claim that a confession was wrongly induced by a promise. Tyson v State, 165 Ga App 222; 299 SE2d 69 (1983). And the mere promise of fair treatment, People v Brewer, 720 P2d 583 (Colo App, 1985), or of bringing any cooperation to the attention of the prosecutor or court, United States v Packer, 730 P2d 1151 (CA __, 1984), will not support a finding of involuntariness. Most jurisdictions view a promise as merely one factor, amid a totality of circumstances, in determining whether a statement is voluntary or coerced. People v Saunders, 135 Ill App 3d 594; 482 NE2d 85 (1985); People v Conte, 421 Mich 704; 365 NW2d 648 (1984). But see, State v Kase, 344 NW2d 223 (Iowa, 1983). And the proper inquiry is not whether the government in some way induced the statement, but rather the inducement creates an unacceptable

pressure that a person, wishing not to confess, will do so in order to remove the pressure to do so. Cf, Dixon v State, 624 SW2d 373 (Tex App, 1981). See also, Grano, Free Will, Voluntariness, and the Law of Confessions, 65 Va L Rev 859 (1979).

Moving to those cases presenting the closest factual parallels to this one, we find little support for the Sixth Circuit's ruling: in United States v Mast, 735 F2d 745 (CA 2, 1984), the Second Circuit held that a governmental promise not to institute criminal proceedings if a fraudulent loan were repaid did not bar the use of ensuing statements at subsequent criminal proceedings, where the defendant never repaid the loan. Similarly, in Commonwealth v Saya, 17 Mass App 921; 456 NE2d 764 (1983), Massachussets rejected the claim that a promise not to execute outstanding warrants for a defendant on unrelated charge in exchange for his cooperation on the case

at bar presented no Fifth Amendment basis for suppressing statements as a result. And in People v Pinkham, 139 Ill App 3d 554; 487 NE2d 707 (1985), Illinois held that a police officer's truthful response to a defendant's questions concerning the possibility of murder charges did not constitute coercion sufficient to support a finding of involuntariness.

Petitioner submits that intimations of leniency, of the type found on this record, do not constitute "coercion" within meaning of the Fifth Amendment, so as to render confession involuntary: the tentative nature of the police representations to Petitioner -- limited by their insistence that Respondent telling them the truth about his level of criminal involvement in the homicide -- bear scant relation to the ordinary meaning of the word "coercion."[5]

[5] See, eg, Webster's Third New International Dictionary of the English

And it would be an odd rule of law that prohibited the police from reassuring reluctant witnesses that -- so long as the speak the truth -- they have nothing to fear from their Government. The implications of such a rule would, after all, bring all guilty pleas within the ambit of "involuntary" admissions of guilt, by mistaking one's motivation to speak for coercion. Moreover, even if this Court were to look favorably upon such a rule, the extension of the concept of "coercion" in such a manner would constitute a new rule of law, which is unavailabe to a petitioner on collateral review. Teague v Lane, 489 US 288 (1989); Sawyer v Smith, ___ US ___; 110 S Ct 2822 (1990).

[5] Continued
Language (Unabridged), (1966), p 439: "coercion:...[the] use of physical or moral force to compel to act or assent...."

Clearly, the lower courts have misapplied this Court's precedents. To prevent future confusion in the area, this Court should intervene to resolve the conflict.

CONCLUSION

WHEREFORE, Petitioner prays that this Court grant plenary review, reverse the holding of the Sixth Circuit Court of Appeals, and reinstate Respondent's state court conviction for first-degree murder.

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Dated: November 20, 1991
JC/jlh

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERT ALLEN WILLIAMS, JR.,

Petitioner,

v

PAMELA WITHROW,

Respondent.

ON APPEAL from the United States District Court for the Eastern District of Michigan

---

OPINION

Decided and Filed September 11, 1991

Before: JONES and RYAN, Circuit Judges; and PECK, Senior Circuit Judge.

JONES, Circuit Judge. Appellant Pamela Withrow, the warden of the Michigan Reformatory, appeals from an order of the district court granting the habeas corpus petition of Robert Allen Williams, Jr. As we discern no error in the district court's grant of Williams' habeas corpus petition, we affirm.

I

On April 6, 1985, police officers in Romulus, Michigan discovered two males shot to death in a parked car. Responding to a rumor, Detective Sgt. David Early of the Romulus Police Department went to Williams' house to question him on April 10, 1985. At the house, Williams was searched but not handcuffed, and was asked to accompany Sgt. Early to the police station. When Williams arrived at the police station, he was questioned by Sgt. Early and his partner, Sgt. Ondejko. Williams was not given **Miranda** warnings before this first round of questioning. After Williams denied having any information about the murders, Early told Williams that "the main thing on this is we want the shooter. We're not real interested in who was there or who was along for the ride or anything else. We get the

shooter on this and we're gonna pretty well be content." Williams continued to deny being present at the scene, prompting Early to state:

> You know everything that went down. You just don't want to talk about it. What it's gonna amount to is you can talk about it now and give us the truth and we're gonna check it out and see if it fits or else we're simply gonna charge you and lock you up and you can just tell it to a defense attorney and let him try and prove differently. We're not playing. We've been chasing around on this too fuckin' long.

Sgt. Early then gave Williams the choice of answering his questions or being formally charged. Sgt. Early also told Williams that he had "big problems", that the police were close to issuing an arrest warrant for him, and that the police knew of witnesses who would testify against Williams. At this point, Williams admitted that he had provided the murder weapon because he wanted to sell the gun, and that the murderer had called him after the crime and told him

he had discarded the gun and his clothes in the river. Questioning continued, with the police again insisting that they were only interested in finding the shooter. Williams again denied being present at the scene of the crime. Sgt. Early later testified that the April 10 interrogation proceeded for "approximately 35 to 40 minutes" before Williams was read his Miranda rights. Williams was questioned a second time on April 10, 1985, and again on April 12 session, and Williams indicated his understanding of his rights.

At the second interrogation on April 10, the following exchange took place between Williams, Sgt. Early, and Sgt. Onjejko:

> Ondejko: Do you wish to change your story?
>
> Williams: What difference is it going to make?

> Ondejko: It's gonna make a lot of difference to you.
>
> Early: I told you. If you told the truth...
>
> Williams: I've been telling you the truth.
>
> Early: Oh, you've been making up fairy tales ever since you've been in here. You're giving us, like he says, parts of the truth, parts of what you want us to believe, and part of what really happened.
>
> Williams: If I tell you everything that happened, I'm gonna walk outta here, huh?
>
> Ondejka: Someday you may stand a chance of walking.
>
> Early: I'll make you a deal. You tell us everything that happened and you tell us the truth and I confirm it on a polygraph that you're telling us the truth. Yeah, you walk.

Following this exchange, Williams admitted driving Mark Sennett, identified as the shooter, to the scene of the murders following behind the victim's car. He also admitted that he turned his car around at the request of Sennett, that he heard shot and muzzle flashes, and that he drove Sennett away from the

scene and helped dispose of Sennett's clothing and the murder weapon. Williams denied knowing that Sennett was going to kill the two victims.

Officer Early then elaborated on the deal with Williams:

> Early: You're worried now about us turning this around on you and charging you too. We've said that basically we want you as a witness. Right?
>
> Williams: Yes.
>
> Early: Alright, I'm gonna tell you right now, at the start of the recording, if we use this recording against you, it's got to be in its entirety. We can't edit it or cut it. We told you if you are a witness to this and if you are telling the truth, and if you are willing to testify, then we are not going to charge you as a co-defendant. That's what we told you, right?
>
> Williams: Yes.
>
> Early: Alright. We're still gonna go by that agreement. And I don't. [Abrupt stop.] You've been around, but if, whether you're up on the law, if a police officer makes an agrement like that it's got to be

> honored. You can go to court and say we made that agreement and we backed down on it and we can't present these tapes and use anything else we've got. So it's an agreement we have to stick to by law. I can't promise you anything and them turn around and back out of it and use it against you.
>
> Williams: O.K.
>
> Early: Right now you're witness to the crime. But we want the truth. If you start lying to us and you start playing games, yeah, we're gonna charge you. A witness doesn't do us any good unless he tells the truth. We're not trying to hang anybody with any made up testimony or anything but the truth. After you're done with this, we still gonna put you on a polygraph and you're gonna have to show us you're telling the truth . So that's the deal. You're telling the truth and you're not being charged. That fair enough?
>
> Williams: Yeah.

On October 29, 1985, Williams was convicted of two counts of felony firearm charges in the Circuit Court of Wayne County. The state trial court excluded the statements from April 11 and 12 as "improperly obtained" under Michigan caselaw because the delay in actually arresting Williams was "used as a tool to

extract the statements". On September 7, 1988, the Court of Appeals of Michigan affirmed Williams' conviction. People v Williams, 171 Mich. App. 234, 429 N.W.2d 649 (1989). The Michigan Supreme Court denied leave to appeal, and the U.S. Supreme Court denied certiorari. 110 S. Ct. 369 (1989). On January 31, 1990, Williams filed a petition for a writ of habeas corpus in the U.S. District Court for the Eastern District of Michigan.

The district court first found that Williams was in custody as of the moment on April when Sgt. Early gave him a choice between answering questions or being charged. As a result, Williams should have been given his **Miranda** warnings at that point. Instead, however, the police continued their questioning without giving **Miranda** warnings, and Williams made inculpatory statements. Williams made further

inculpatory statements after **Miranda** warnings were finally given some forth minutes into interrogation.

The district court evaluated the admissibility of these post-**Miranda** statements under Oregon v. Elstad, 470 U.S. 229 (1985). Elstad held that there is no presumption of coercion when a suspect makes incriminating statements following earlier, unwarned statements. In that situation, "the relevant inquiry is whether, in fact, the second statement was also voluntarily made. As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements." Elstad, 470 U.S. at 318.

Focusing on whether Williams' admissions were induced by a promise of leniency, the district court concluded that:

> In the context of this uncounseled interrogation, following a session where police had obtained unwarned admissions and repeatedly suggested that they were only interested in finding out who the actual shooter was, this Court finds that the statement that petitioner would "walk" if he told the truth constituted a promise of leniency sufficient to overcome petitioner's will and render his admissions involuntary. As Justice White indicated in Brady [v. United States, 397 U.S. 742 (1970)], [i]n such circumstances, even a mild promise of leniency [may be] sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess." Brady, supra, at 754.

The district court declared that Williams' inculpatory statements on April 10 obtained after the **Miranda** warnings were given violated the dictates of Oregon v. Elstad, 470 U.S. 298 (1985)

because of the coercion. See also Bram v. United States, 168 U.S. 532, 542-43 (1987)(to be admissible, a confession must be "free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.").

The district court also considered the statements under harmless error analysis. United States v Wolf, 879 F.2d 1320, 1323 (6th Cir. 1989) ("Appellate courts, including our own, have applied the harmless error analysis to [otherwise voluntary] confessions admitted in violation of the related rules of **Edwards** and **Miranda**.") The district court found that sufficient evidence to convict independent of the confession did not exist; therefore, admission of the confession was not harmless error.

On October 29, 1990, the district court granted Williams' petition for a writ of habeas corpus and gave Michigan ninety days to "take steps to provide" Williams with a new trial. This appeal followed.

II

This court renders de novo review of a habeas corpus proceeding in the district court to determine whether the petitioner received a fundamentally fair trial. See Lundy v Campbell, 888 F.2d 467-70 (6th Cir. 1989), cert. denied, 110 S. Ct. 2212 (1990). However, this court must give complete deference to the state court's findings of fact, and render clearly erroneous review to the district court's factual findings. Id.

The principal issue in this appeal is whether the record disclosed a fifth

amendment violation sufficient to warrant habeas relief.[1] Withrow argues that there was no violation of Williams' fifth amendment rights because Williams was not in custody until he made an incriminating statement, at which point he was Miranda-ized. This argument is supported by the state trial court and the Michigan Court of Appeals, which both found that Williams "was not in custody until he was read his rights." Williams, 429 N.W.2d at 651. Thus contends Withrow, because the federal habeas statute "requires the federal courts to show a high measure of deference to the factfindings made by the state courts" Sumner v Mata, 45 U.S. 591, 598 (1982)(per curiam), the district

[1] 1. The government's brief argued that the federal grounds for relief were never fairly presented to the state court for review. At oral argument, the government conceded that this position was without merit.

court exceeded its mandate by not explaining in sufficient detail why "the record in the State court proceeding, considered as a whole, does not fairly support such factual determination." 28 U.S.C. §2254(d)(1988).

The district court did recognize its obligation to defer to the state court's factual findings. With respect to the crucial "in custody" determination, however, the district court recognized that "the overall question of whether petitioner was in custody is a mixed question of fact and law which requires an independent federal determination." Even if custody is a factual determination entitled to a presumption of correctness, however, the district court found that "this particular state court finding is so completely devoid of support in the record that the presumption is overcome."

We find that the district court correctly decided that Williams was "in custody" when Sgt Early told him "you can talk about it now and give us the truth and we're gonna check it out and see if it fits or else we're simply gonna charge you and lock you up[.]" (Emphasis added.) Two police officers came to Williams' house, searched him, put him in an unmarked police car, and transported him to the police station. The officers repeatedly conveyed to Williams the seriousness of his situation, and threatened him with arrest. Williams was given the choice of cooperating with the police or going to jail. The district judge, who listened to an audio tape of the interrogation, found the officers' tone to be "severe and accusatory." Clearly, a reasonable person would not feel free to leave; therefore, Williams was in custody. Miranda v. Arizona, 384 U.S. 436, 444 (1966) ("[C]ustodial

interrogation... [is] questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.").

Williams' inculpatory statements after he was given **Miranda** warnings could be admissible, even though the statements followed on the heels of unwarned statements, if the statements are determined to be uncoerced voluntary. Oregon v. Elstad, 470 U.S. 298, 309 (1985). "'[T]he ultimate issue of 'voluntariness' is a legal question requiring independent federal determination.'" Arizona v Fulminante, 111 S. Ct. 1246, 1252 (1991) (citations omitted). Withrow contends that the district court incorrectly concluded that Williams' statements were involuntary

under Oregon v Elstad because there was no overreaching or coercion by the police. The police merely offered Williams a conditional incentive to tell the truth, and the fact that Williams did not fulfill his part of the bargain by telling the truth should not lead to the suppression of his statement. The police, asserts Withrow, intended to live up to their part of the bargain. Officer Early testified that "I told Mr. Williams that if he was a witness, and he had no active part in the crime, and that could be confirmed by polygraph, that he would not be charged."

The district court relied on "the surrounding circumstances and the entire course of police conduct with resect to the suspect in evaluating the voluntariness of his statements." Elstad, 470 U.S. at 318. We believe that an evaluating of "the entire course of police conduct" in

this case establishes that Williams' statements were not voluntary. His statements were conditioned on his belief that he would be released if he talked. The officers' promises of leniency were intended to induce Williams' admissions.

We recognized that the success of a criminal investigation often hinges on obtaining information from uncooperative individuals. Indeed, many otherwise unobtainable convictions are secured through extending immunity in exchange for a defendant's testimony against more culpable co-defendants. The necessity of foregoing the prosecution of an informant in order to convict the ringleaders is an altogether different situation from the deliberate inducement of inculpatory statements through illusory promises of leniency. Even in situations where immunity is not envisaged, we have no

doubt that effective interrogation techniques require, to some extent, a carrot-and-stick approach to eliciting information from an uncooperative suspect. However, when promises of leniency, coupled with threats of immediate imprisonment, have a coercive effect on a suspect, we are obliged to inquire whether "the 'coercion' in question was sufficient to overbear the will of the accused." McCall v Dutton, 863 F.2d 454, 459 (6th Cir.) cert. denied, 490 U.S. 1020 (1989) (three factors of voluntariness test are (1) objectively coercive police activity which (2) was sufficient to overbear the will of the accused, and (3) petitioner's will was overborne as a result of the coercion). We find that, under the totality of the circumstances of this case, Williams' statements during the April 10 interrogation were coerced in violation of the fifth amendment and should therefore be suppressed.

III

The district court granted the writ of habeas corpus based on its conclusion that the incriminating statements on April 10-12 should be excluded as involuntary. However, the state trial court had already excluded the statements made on April 11 and 12 in September 1985, one month before Williams' bench trial. The trial judge based the exclusion on Michigan law:

> Defendant was lodged in jail, and was questioned twice more in addition to undergoing a polygraph examination before he was arraigned on the afternoon of April 12. Statements obtained during an unnecessary delay in arraignment, where the delay is used as a tool to extract the statements, are not admissible. People v Mallory, 421 Mich 229, 241; 365 NW2d 673 (1985); People v Bladel, 421 Mich. 39, 70; 365 NW2d 56 (1985). No facts have been offered to explain the delay in this case. The Court finds that the delay was for the purpose of extracting inculpatory statements. The statement made by Defendant on April 11 and April 12 were improperly obtained and must be excluded.

The opinion of the district court inexplicably does not mention that the April 11 and 12 statements had already been excluded by the state trial court. Withrow argues that Judge Hackett was "completely unaware" that the April 11 and 12 statements had already been excluded and were never introduced into evidence at the bench trial. Although the statements made on April 11-12 were not admitted against Williams at trial, our conclusion that the inculpatory statements made on April 10 should have been excluded still mandates a new trial. Furthermore, we are convinced that the other evidence against Williams--without the April 10 statements--was insufficient to support a conviction.

The district court considered the applicability of United States v Wolf, 879 F.2d 320 (6th Cir. 1989), which held that "the erroneous admission of an

otherwise voluntary confession obtained in violation of the prophylactic rules of Miranda and its progeny can be harmless. Id. at 1323 (citations omitted). As Wolf was not a habeas corpus case, the district court was not required to address the harmless error issue. Under the U.S. Supreme Court's decision in Arizona v. Fulminate, 111 S. Ct. 1246 (1991), however, harmless error analysis is applicable to the instant case. Fulminante held that the admission of an involuntary confession is subject to harmless error analysis. Id. at 1265.

It is unclear, however, whether Fulminante should be applied retroactively to this case. In general, new rules are only applicable to habeas corpus cases in two narrowly defined instances: (1) if the new rule places an entire category of primary conduct beyond the reach of the criminal law; or (2) new

"watershed" rules of criminal procedure necessary to a criminal proceeding's fundamental fairness. Sawyer v. Smith, 110 S. Ct. 2822, 2831 (1990). Before Fulminante, the use of an involuntary confession to support a conviction was a due process violation whether or not evidence apart from the confession existed. It seems clear, then, the Fulminante "alter[s] our understanding of the bedrock procedural elements", 110 S. Ct. at 2831, therefore, harmless error analysis must be applied.

The district court applied harmless error analysis to the involuntary confession, and concluded that:

> There were no lawful confessions admitted in this case. Moreover, the other evidence against petitioner at trial, while substantial, was not massive or overwhelming. No witness was able to identify petitioner as being present at the scene of the murders. Petitioner was linked by testimony to the murder weapon and to the

> victims. If, arguendo, harmless error analysis did apply to the admission of petitioner's inculpatory statements, this court could not find that admission of those statements was "harmless error beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967).

We are in agreement with the district court that the admission of the April 10 statements was not harmless error.

IV

Finally, Withrow argues that custodial interrogation is not an appropriate issue for collateral review on petition for a writ of habeas corpus. Withrow cites to Stone v. Powell, 428 U.S. 465 (1976), which held that collateral relief in a habeas proceeding was not available for defendants raising fourth amendment search and seizure claims, when those defendants have had a full and fair opportunity to raise those

claims in state court. Both in his brief and during oral argument, counsel for Withrow evinced considerable hostility toward the entire habeas system of review, but provided no support for extending Stone v Powell to fifth amendment claims. Neither the Supreme Court nor any Courts of Appeal has ever indicated a willingness to do so. Moreover, it is extremely unlikely the Supreme Court will do so anytime soon, given its statement in Fulminante that "'the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination.'" 111 S. Ct. at 1252 (citation omitted).

V

The district court's grant of Williams' petition for a writ of habeas corpus is **AFFIRMED.**

APPENDIX B

Case No: 90-2289
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

Filed October 3, 1991
Leonard Green, Clerk

ROBERT ALLEN WILLIAMS,

Petitioner-Appellee

v.

PAMELA WITHROW,

Respondent-Appellant.

BEFORE: JONES and RYAN, Circuit Judges; and PECK, Senior Circuit Judge.

Upon consideration of the petition for rehearing filed by the appellant,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

SIGNED

LEONARD GREEN, CLERK

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO: 90-2289

Filed 9/11/91
Leonard Green, Clerk

ROBERT ALLEN WILLIAMS, JR.,

Petitioner-Appellee,

v.

PAMELA WITHROW,

Respondent-Appellant.

Before: Jones and Ryan, Circuit Judge;
Peck, Senior Circuit Judge

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

LEONARD GREEN, CLERK

Issued as Mandate: October 11, 1991

COSTS: None Attest: A True Copy.

SIGNED

DEPUTY CLERK

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT ALLEN WILLIAMS, JR.,

Petitioner,

PAMELA WITHROW,

Respondent.

Case No: 90-CV-70256-DT
HON BARBARA K. HACKETT

MEMORANDUM OPINION AND ORDER

Petitioner, Robert Allen Williams, Jr., presently confined at the Michigan Reformatory in Ionia, Michigan, has filed this pro se application for writ of habeas corpus pursuant to 28 U.S.C. §2254.

PROCEDURAL HISTORY

On October 29, 1985, following a bench trial, Petitioner was convicted of two counts of first-degree murder, and

two counts of felony firearm. On November 6, 1985, Petitioner was sentenced to two concurrent terms of life imprisonment for first-degree murder, and two consecutive terms of two years imprisonment for felony firearm. On December 18, 1986, after an evidentiary hearing, the trial court vacated one felony firearm count and denied Petitioner's motion for new trial.

On September 7, 1988, the Michigan Court of Appeals affirmed Petitioner's convictions in a published opinion. People v Williams, 171 Mich. App. 234, 429 N.W.2d 649 (1989). Petitioner had raised three issues in his appeal. He claimed that his Fifth Amendment privilege against self-incrimination was violated when the trial court failed to suppress a statement he gave to police prior to receiving his Miranda warnings. He also claimed that his trial counsel

was ineffective for failing to advise him of a possible plea offer and that the trial court had not made adequate findings of fact. On June 9, 1989, the Michigan Supreme Court denied Petitioner leave to appeal. 432 Mich. 911. Petitioner raised only the Miranda and ineffective assistance of counsel issues in his application for leave to appeal.

Petitioner filed this application for writ of habeas corpus on January 31, 1990. In his application, he raises the three issues raised in his appeal to the Michigan Court of Appeals.

The respondent has answered and contends that petitioner has raised no issues justifying relief. Respondent claims that petitioner's Miranda rights were not violated because police need not give Miranda warnings to persons subjected to non-custodial police

interrogation and that petitioner was given Miranda warnings as soon as he was put in custody. Respondent states that petitioner's ineffective assistance of counsel claim is meritless because the record does not support his claim that counsel failed to advise him of a plea offer. Finally, respondent defends that petitioner's claim that the trial court made insufficient findings of fact is barred from habeas review by procedural default because he failed to present this issue to the Michigan Supreme Court in a timely fashion. Furthermore, respondent contends, the issue is solely a matter of State law and not cognizable on habeas review.

Issue One, alleging violation of Petitioner's rights under Miranda and the Fifth Amendment is exhausted. Petitioner has raised this issue in his appeals to both Michigan appellate courts. Having

raised this issue, which is well with in the mainstream of constitutional litigation, and having called upon the Michigan courts to examine the entire record, including tape recordings of his statements to the police, petitioner has exhausted this issue.

Issue Two, alleging ineffective assistance of counsel, is also exhausted, as Petitioner has raised this issue before both the Michigan Court of Appeals and the Michigan Supreme Court.

Issue Three, Petitioner's claim that the trial court made inadequate findings of fact is also exhausted. Petitioner presented this issue to the Michigan Court of Appeals which denied relief on this ground in its opinion of September 7, 1988. Petitioner did not, however, present this issue to the Michigan Supreme Court. See, Application for

Leave to Appeal to the Michigan Supreme Court's 56-day rule, M.C.R. 7.302 (C)(3), Petitioner is now barred by this state procedural default. Respondent has raised the defense of procedural default on this issue. Because Petitioner has procedurally defaulted on this particular claim under Michigan state law, he is barred from raising this particular claim as grounds for habeas relief absent a showing of cause for the default and prejudice resulting from the alleged constitutional violation. Murray v Carrier, 477 U.S. 478, 106 S. Ct. 2639, 91 L.Ed.2d 397 (1986). Petitioner has made no such showing. In fact, he has not even alleged any cause for this default, stating incorrectly in his habeas petition that this issue was presented to the Michigan Supreme Court. Consequently, Issue Three, the claimed inadequacy of the trial courts findings

of fact, is barred from habeas review in the present case[1]. Accordingly, this Court will not discuss the merits of this Issue.

FACTUAL BACKGROUND

Van Robin Hooper and Charles David Stanley were shot to death in Hooper's Volvo on a dead end street in Romulus, Michigan. They were shot at close range with a 9mm weapon. An eyewitness, James Scamp, testified that he heard four or five sounds which he first thought were backfires at about 1:10 a.m., April 6, 1985. Scamp was awake in his bedroom at the time. After hearing these noises, he

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1. The rule from Harris v. Reed, 489 U.S. 255, 109 S.Ct. 1038, 1040, 103 L.Ed.2d 308 (1989), that there must be a clear and express finding of procedural default in a state court's judgment before the habeas court will find an issue procedurally defaulted does not apply here. In the present case, the issue in question was not presented to the Michigan Supreme Court at all. Therefore, that court

heard the roaring of a loud car motor which prompted him to go to his window to see if he recognized the car making so much noise. He testified that he saw a back and side view of a person jogging from the passenger side of what later proved to be Hooper's car toward the passenger side of another car. This second car then drove off with its lights off. Scamp stated that it was raining at the time and that he saw this person jogging between the two cars for about three of four seconds from a distance of about ninety feet away. He stated that the person he saw had shoulder length light brown hair, was wearing jeans and a dark colored jacket, and appeared to be

1. (con't) had no reason to address the issue. The rule from Harris only applies when an issue has been presented to the court whose ruling is being analyzed to determine if that court reached the merits of the issue or relied upon a state procedural default.

wearing white shoes from reflections he saw on the wet pavement. Scamp stated he first thought this person was a female because of the hair, body proportions, and jogging stride. Tr. 11, 33-4

Several witnesses testified that Petitioner and Mark Sennett had been seen in the presence of Hooper and Stanley shortly before the killing. There was testimony that Williams drove off in the Torino following Hooper, Stanley, and Sennett in Hooper's Volvo shortly before the killing. Tr. 90. There was also testimony from Gerald Woods that Williams admitted to his that he had followed Sennett, Hooper, and Stanley in another car and that Sennett had shot Hopper and Stankey, gotten in the car Williams was driving and that Williams and Sennett had driven away together and disposed of the murder weapon.

Detective Sgt. David Early of the Romulus Police testified from memory regarding admissions made by Williams during police interrogation. Early related that Williams admitted he had followed in the Torino while Sennett, Hooper, and Stanley drove to dark one-way street in Romulus. Williams also admitted stopping his car behind Hooper's parked Volvo and turning the Torino around when Sennett walked up to the Torino and told him to do so. Williams stated that Sennett also asked him if he (Sennett) should use a gun or a knife shortly before Sennett admitted he had then driven Sennett away from the scene after the shooting and that he helped Sennett dispose of the murder weapon and clothing Sennett had been wearing. Williams denied having shot Hooper or Stanley. Williams also denied knowing that Sennett planned to kill them before he saw the muzzle flashes while he was turning the Torino around. Tr. 161-63.

After a two day bench trial, the court found Williams guilty of two counts of first degree murder. The court "declined to decide whether [he] was the principal or an aider and abettor." People v. Williams, 171 Mich. App. at 238.

I. MIRANDA AND THE FIFTH AMENDMENT

PETITIONER'S SUBSTANTIVE CLAIMS

Petitioner objected to the admission of the statements he gave the police. He received a Walker[2] hearing in which the admissibility of his statements was decided. At the Walker hearing, petitioner's counsel mainly argued that petitioner had been subjected to unwarned custodial interrogation. Counsel argued that petitioner's statements in response to this unwarned interrogation were

2. People v Walker, 374 Mich. 331, 132 N.W.2d 87 (1965).

inadmissible. He also claimed that later statements in response to warned interrogation were tainted by the prior, unwarned statements. Finally, counsel argued that "promises of leniency" rendered petitioner's statements involuntary, citing People v. Conte, 421 Mich. 704, 365 N.E.2d 648 (1984).[3] Suppression Hearing Transcript (SH Tr.) at 36. As previously discussed, a summary of petitioner statements as related by Sgt. Early was admitted at trial. The Michigan Court of Appeals denied relief on this issue, writing: "The court [below] listened to a tape of the conversation between defendant and Early. The court held that defendant was the focus of the police investigation

3. Conte was decided on the basis of the Michigan state constitution. However, it discusses relevant federal precedent particularly U.S. Supreme Court precedent, at length.

until he made statements incriminating himself and was not in custody until he was read his rights. We cannot say that the trial court's findings were clearly erroneous." People v Williams, 171 Mich. App. 234, 238 (1988).

Petitioner was interrogated at three sessions. Two of these sessions took place on April 10, 1985. One of these sessions took place on April 1, 1985. The two April 10, 1985 sessions have not been transcribed. This Court has scrutinized these confessions by listening to three separate audio tapes labeled "Office" (Session one), "Rights in Office" (Session two), and "Video" (Session two). Each of these audio tapes is about one-half hour long. The fourth session was transcribed. It was also

recorded on videotape.[4] This session was abut fifty minutes long.

Peititoner did not receive any Miranda warnings at Session one. Miranda warnings are only required when a person is subjected to custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.ED.2d 694 (1966). The state trial court found that petitioner was not in custody at this session and the Michigan Court of Appeals found this ruling was not clearly erroneous. This does not resolve the matter, however.

This Court believes that it must make an independent determination of whether or not petitioner was in custody during interrogation session one. In

4. The audiotape labelled "Video" of April 10, 1985, and the videotaped session dated April 12, 1985, which has been transcribed are definitely not the same session.

making this determination, this Court believes that the State court's subsidiary findings of fact a presumption of correctness. 28 U.S.C. §2254(d). For example, a finding that petitioner was not told he was free to go, would be a subsidiary finding of fact. However, this Court believes that the overall question of whether petitioner was in custody is a mixed question of fact and law which requires an independent federal determination. Furthermore, as an analysis of the tape recording of session one will reveal, this Court also believes that if, arguendo, the custody question is a fact question subject to the §2254(d) presumption of correctness, this particular state court finding is so completely devoid of support in the record that the presumption is overcome. 28 U.S.C. §2254(d)(8).

The Supreme Court has established the test for determining custody for Miranda purposes. In Miranda the Court wrote that:

> By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Miranda, Id. at 444.

In Berkermer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), the Court ruled that the test for determining custody is objective. The Court wrote: "... the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." Berkemer, Id. at 34-5. That is, the relevant inquiry is whether a reasonable man in the suspect's position would believe that he was in custody, i.e. not free to go.

THE FIRST INTERROGATION SESSION

On April 10, 1985, Sgt. Early and Sgt. Ondejko went to petitioner's house to bring him in for questioning. They asked petitioner if he would come with them to the police station and he agreed. He was brought to the police station by these two officers in an unmarked police car. Early testified that petitioner was not arrested at his house.[5] There is no indication that petitioner was ever told he was free to go or that he was not under arrest during the first interrogation session.

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5. At the Walker hearing, Early was impeached with a copy of a police computer printout which stated Williams was arrested at his residence. Early acknowledged the printout reported Williams was arrested at his home, but stated this was incorrect. Hearing Tr. at 14.

After arriving at the Romulus police station, petitioner was taken to a room where he was questioned by early and Ondejko. Petitioner was not accompanied by any friends, relatives, or counsel. The interrogation session began as follows:

Early:	"For starters, you've got big problems."
Williams:	"Big problems. You got people that are gonna testify that put you with this gun.[6] That are gonna testify that you had it, where you had it.
Ondejko:	There's gonna be two life sentences here. This ain't no game.

6. That is, the murder weapon. Romulus police were able to establish through a combination of testimonial and physical evidence that immediately before the murders Williams had possession of the gun which fired the bullets that killed Hooper and Stanley. Williams also admitted this in his statements. He later claimed he had given Sennett the gun shortly before the killings because he wanted Sennett to help him sell it.

Early:	We're about that far tight now from getting a warrant for you. You may not have been the shooter. You supplied the gun and know what happened. We think you were probably there and we think we can prove it.
Williams:	Nope. I wasn't there.
Early:	But the main thing on this is we want the shooter. We're not real interested in who was there or who was along for the ride or anything else. We get the shooter on this and we're gonna pretty well be content.

Session One, Audiotape labelled "Office", Counter between approximately 028 and 079.

The tone of these police statements was serious and accusatory. After this exchange, police continued questioning petitioner, asking him if he had been at the scene of the murders, where he had been the night of the murders, and how Sennett had gotten the gun. Petitioner

continued to deny he had bene at the scene of the killings and stated he did not know how Sennett got the gun.

A few minutes later Ondejko asked Early in a low voice, "Did you read him his rights?" Early replied in a hushed, lower voice, "Not yet."

Shortly afterwards Early made the following statement to petitioner:

> You know everything that went down. You just don't want to talk about it. What it's gonna amount to is you can talk about it now and give us the truth and we're gonna check it out and see if it fits or else we're simply gonna charge you and lock you up and you can just tell it to a defense attorney and let him try and prove differently. We're not playing. We've been chasing around on this too fuckin' long. ("Office" Audiotape.)

The tone of this statement was again severe and accusatory. This last exchange offered petitioner the choice of answer-ing his interrogators' questions or being formally charged. Furthermore,

the police had indicated to petitioner that he had "big problems," that they were "that far right now from getting a warrant for you." Moreover, petitioner had been told that there were witnesses who would testify of his connection to the murder weapon. He also had been told police believed he had been at the scene when the killings occurred and that they thought they could prove it. Petitioner may have been in custody as soon as he was told these facts. This Court believes he was definitely in custody when he was told that he had a choice between answering his interrogators' questions and being formally charged and locked up. This choice did not leave petitioner free to go. It gave him the choice of surrendering his right to remain silent or being formally arrested. This was a significant deprivation of his freedom of action. A reasonable person

in this position would have believed he was in custody at this time.[7]

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7. In Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977), the Supreme Court ruled that police interrogation is not necessarily custodial simply because it occurs in the station house. In Mathiason, a parolee was suspected of committing a burglary. Twenty five days after the burglary, the investigating officer left his card at the suspect's apartment together with a note stating he would "'like to discuss something'". Id. at 493. The next day the suspect called the officer on the phone and agreed to come to the station. When the suspect arrived at the state patrol office about two blocks from his home he was told he was not under arrest. He was not given Miranda warnings.

The suspect was told that police believed he had been involved in the burglary and was also told (falsely) that his fingerprints had been found at the scene. A few minutes later, the suspect admitted he had taken the property. The Court ruled that Mathiason had not been in custody at that point.

In a similar case, California v. Beheler, 463 U.S. 1121, 103 S.Ct. 3517, Title 2d 1275 (1983), the Court reached the same conclusion. Beheler had called the police and "voluntarily agreed to accompany police to the station house, although the police specifically told [him] that he was not under arrest." Id. at 1122. Beheler was questioned for about 30 minutes and allowed to go home. The Court ruled that he was not in custody during this period of questioning.

Petitioner should have been given Miranda warnings at this time. However, he was not. Questioning continued an petitioner admitted that he had given Sennett the murder weapon the night of the killings. Petitioner claimed that he had done this only because he wanted to sell the gun. Petitioner also stated that Sennett had called him after the killings and had told him the gun and the clothes were in the river. Petitioner continued to deny that he had been present at the murder scene. The police continued to suggest that they were

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7. (con't)

This Court believes the present case is distinguishable from Mathiason and Beheler. Petitioner was taken to the station house by police officers upon their initiative, not his. He was never told he was not under arrest. He was told witnesses linked him to the murder weapon and given the choice of answering police questions or being formally charged and locked up. Taken as a whole, these facts show that petitioner was in custody during his first interrogation session.

interested only in finding the shooter. This session ended with the police telling petitioner he was holding something back and lying himself into a corner. Thus, tis Court finds that petitioner made several damaging admissions in response to unwarned, custodial police interrogation.

SUBSEQUENT INTERROGATION SESSIONS

Petitioner was subjected to two additional interrogations, one session recorded on two audiotapes dated April 10, 1985, and another session on April 12, 1985, recorded on videotape and transcribed. At each of these last two sessions, petitioner was given Miranda warnings at the beginning of the session. Each time he was asked if understood his rights and each time he either explicitly answered in the affirmative or continued on his own initiative to discuss matters

with his questioners. He made additional incriminating statements at these subsequent sessions, reiterating and going beyond the admissions he made at the first, unwarned session.

This presents the question of whether petitioner's first, unwarned admissions tainted his subsequent, warned admissions.

In Oregon v Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), the Supreme Court ruled that:

> [A] suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the prerequisite Miranda warnings.

Id. at 318

Thus, the fact that petitioner made unwarned inculpatory admissions in the first interrogation session does not necessarily mean his later, warned

admissions are constitutionally defective. That is, the simple fact that these later admissions followed admissions obtained in violation of Miranda does not bar their use. The mere fact that petitioner may have thought the "cat was out of the bag" does not bar use of his subsequent, warned admissions. Id. at 311-13.

However, this Court is required to make the voluntariness inquiry outlined in Elstad before these subsequent warned admissions can be found to meet the requirements of the Constitution. The voluntariness of a confession is determined by an analysis of "... the surrounding circumstances and the entire course of police conduct with respect to the suspect ...." Elstad, Id. at 318. "[T]he Court's confession cases hold that the ultimate issue of 'voluntariness' is a legal question requiring independent

federal determination." Miller v Fenton, 474 U.S. 104, 112 106 S.Ct. 445, 88 L.Ed.2d 405 (1985). Therefore, this Court will conduct a de novo review of voluntariness.

Discussing the admissibility of confessions under the Due Process Clause, Justice Frankfurter wrote that:

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.
>
> Culombe v. Connecticut, 367 U.S. 568, 602, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1960)

Factors to be considered in making this determination include the duration and conditions of detention, the attitude of the police toward the suspect, the age, mental state, intelligence, and

education of the suspect, as well as the awareness of the suspect of his constitutional rights. Id., See also, Schneckloth v. Bustamonte cite cases where a particular factor stood out while noting that the totality of circumstances must be considered. Elstad also notes that a statement must be voluntary "within the meaning of the Fifth Amendment" to be admissible, Elstad, supra, at 315, and suggests that "threats or promises" made by police are factors to consider in analyzing voluntariness. Id. at 302.

VOLUNTARY ANALYSIS OF PETITIONER'S SUBSEQUENT STATEMENTS

Petitioner was given Miranda warnings at the beginning of the second interrogation session. At the state suppression hearing, Sgt. Early testified that there was no indication petitioner

was under the influence of drugs or alcohol. SH Tr. at 9. There is no testimony on the record as to petitioner's age or education. However, this Court has listened to three audiotapes and viewed one videotape of the interrogation sessions. On the videotape, petitioner appears to have been about 30 years old. While this is only an estimate, it is clear that he was not particularly youthful. He was not a boy, or even a very young man. Furthermore, petitioner testified that he had six prior felony convictions for breaking and entering, and receiving and concealing stolen property. SH Tr. at 21. Sgt. Early testified that petitioner was lucid. This is supported by the four recordings and one transcript of the sessions. The three April 10, 1985, sessions are each about one-half hour long. These factors tend to indicate that any admissions petitioner made were voluntary.

However, there is an additional factor which must be considered in this case. A suspect's will can also be overborne by promises or inducements. In Brady v United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), Justice White, writing for the majority, discussed this issue as follows:

> Bram v. United States, 168 U.S. 532 (1897), held that the admissibility of a confession depended upon whether it was compelled within the meaning of the Fifth Amendment. To be admissible, a confession must be 'free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.' 168 U.S. at 542-543. More recently, Malloy v. Hogan, 378 U.S. 1 (1964), carried forward the Bram definition of compulsion in the curse of holding applicable to the States the Fifth Amendment privilege against self-incrimination.

Brady, Id. at 753

Brady, who was advised by competent counsel before entering his plea, had pleaded guilty to a kidnapping charge where the victim had not been released

unharmed. Brady claimed that his plea was involuntary because the pertinent statute provided that maximum penalty after a guilty plea was life imprisonment, while a guilty verdict after jury trial could result in a death sentence. Brady claimed that under Bram this amounted to an improper promise of leniency which rendered his guilty plea involuntary. Justice White explained why Bram did not control Brady's case:

> Bram is not inconsistent with our holding that Brady's plea was not compelled even though the law promised him a lesser maximum penalty if he did not go to trial. Bram dealt with a confession given by a defendant in custody, alone and unrepresented by counsel. In such circumstances, even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess. But Bram and its progeny did not hold that the possibly coercive impact of a promise of leniency could not be dissipated by the presence and advice of counsel, any more that Miranda v Arizona,

> held that the possibly coercive atmosphere of the police station could not be counteracted by the presence of counsel or other safeguards.

Brady, at 754 (citations and footnotes omitted, emphasis added)

In the present case, Sgt. Early was asked at the suppression hearing if any promises had been made to petitioner. He answered as follows:

> The only promise or statement of that type given Mr. Williams was that if he was only a witness with no involvement, he most likely would not be charged in the case, but then subsequently [it] came to the point where he was definitely more than a witness, and also polygraph examination was involved. We stated that he would have to pass polygraph examination and [he] did not.

SH Tr. at 8-9.

Petitioner was given Miranda warnings at the beginning of the second interrogation session. After Miranda warnings were given, the following exchange took place:

Early:	Do you understand your rights that I've explained to you?

Williams:	What does this mean?
Early:	You're being charged with murder in the first.
Williams:	Why?
Ondejko:	Because you won't level with us.
Early:	Do you understand your rights?
Williams:	Yeah. (nearly inaudible after a long pause).
Early:	Do you wish to make any further statements at this time?
Ondejko:	Do you wish to change your story? (softly)
Williams:	What difference is it going to make?
Ondejko:	It's gonna make a lot of difference to you.
Early:	I told you. If you told the truth (Stops abruptly when interrupted by Williams).
Williams:	(interrupting Early) I've been telling you the truth.
Early:	Oh, you've been making up fairy tales ever since you've been in here. You're giving us, like he says, parts of the truth, parts of what you want us to

believe, and part of what really happened. (angrily).

Williams: If I tell you everything that happened, I'm gonna walk outta here, huh?

Ondejko: Someday you may stand a chance of walking.

Early: I'll make you a deal. You tell us everything that happened and you tell us the truth and I confirm it on a polygraph that you're telling us the truth. Yeah, you walk.

Audiotape labelled "Rights in Office", Counter reading between 090-120.

Early then explained that a polygraph test would have to be given the next day. He then told petitioner, "Tomorrow you can walk out of here if you're telling me the truth." Id.

Shortly after this discussion, petitioner changed his story, making several additional damaging admissions. In his first unwarned statement, petitioner had denied being present at

the scene of the killings. In his second statement, he admitted driving the Torino and following Sennett, Hooper, and Stanley, who were in Hooper's Volvo. He admitted following them to scene of murders and turning the car around at Sennett's request. He stated he heard several shots and saw muzzle flashes. He admitted driving Sennett away at Sennett's request and throwing the murder weapon in the river. Petitioner also admitted helping dispose of clothing Sennett had been wearing. He denied having any knowledge Sennett was going to kill Hooper and Stanley before he saw the muzzle flashes. He also denied having shot the victims.

The critical question in this case is whether petitioner's admissions in this second interrogation session were induced by a police promise of leniency. It should be noted that a repeated theme

in the first, unwarned session was that the police were basically interested in getting the shooter. After promising petitioner that he would "walk" if he told them the truth, petitioner was encouraged to "open up and lock him [Sennett] up, that's all." Audiotape, "Rights in Office" at counter 167-8.

In the context of this uncounseled interrogation, following a session where police had obtained unwarned admissions and repeatedly suggested that they were only interested in finding out who the actual shooter was, this Court finds that the statement that petitioner would "walk" if he told the truth constituted a promise of leniency sufficient to overcome petitioner's will and render his admissions involuntary. As Justice White indicated in Brady, "[i]n such circumstances, even a mild promise of leniency [may be] sufficient to bar the con-

fession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess." Brady, supra, at 754.

It may be asserted that Early's promise that petitioner would "walk" did not constitute a promise of leniency, that it is too ambiguous to be so considered. This Court does not believe this to be the case, even on the basis of the "Right in Office" tape alone. However, this Court need not rely on its interpretation of this tape alone. In a third tape, labeled "Video"8

8. No additional Miranda warnings were given at the beginning of this third tape. The tape is dated April 10, 1985. No time of day is indicated. This interrogation clearly follows the interrogation recorded on the "Rights in Office" tape because it refers to statements made on that tape. Although it has been given

after noting that petitioner had been read his rights and that he still made a statement, Sgt. Early elaborated on the promise that had been made to petitioner as follows:

Early: You're worried now about us turning this around on you and charging you too. We've said that basically we ant you as a witness. Right?

Williams: Yes

Early: Alright, I'm gonna tell you right now, at the start of the recording, if we use this recording against you, it's got to be in its entirety. We can't edit it or cut it. We told you if you are a witness to this and if you are telling the truth, and if you are willing to testify, then we are not going to charge you as a

8. (con't) a different title and is on a separate tape, it should probably be considered a continuation of the same interrogation session recorded on the "Rights in Office" tape. (Although the tape is labelled "Video", it does not follow interrogation session recorded on videotape. The videotaped session is dated April 12, 1985).

co-defendant. That's what we told you, right?

Williams: Yes.

Early: Alright. We're still gonna go by that agreement. And I don't. [abrupt stop]. You've been around, but if, whether you're up on the law, if a police officer makes an agrement like that it's got to be honored. You can go to court and say we made that agreement and we backed down on it and we can't present these tapes and use anything else we've got. So it's an agreement we have to stick to by law. I can't promise you anything and then turn around and back out of it and use it against you.

Williams: O.K.

Early: Right now you're a witness to the crime. But we ant the truth. If you start lying to us and you start playing games, yeah, we're gonna charge you. A witness doesn't do us any good unless he tells the truth. We're not trying to hang anybody with this, we're still gonna put

> you on a polygraph and you're gonna have to show us you're telling the truth and you're not being charged. That fair enough?

Williams: Yeah.

Audiotape labelled "Video" at 028-068.

The federal courts have not interpreted Bram liberally. Bram does not preclude counseled guilty pleas, although these often involve at least implied promises of leniency or pleas to less than maximum possible charges. Brady, supra, at 752-53. "An interrogating agent's promise to inform the government prosecutor about a suspect's cooperation does not render a subsequent statement involuntary, even when it is accompanied by a promise to recommend leniency or by speculation will have a positive effect". U.S. v. Leon Guerreri, 847 F.2d 1363, 1366 (9th Cir, 1988). Mere exhortations to tell the truth do not render a confession

involuntary. Crooker v. California, 357 U.S. 433, 437 78 S.Ct. 1287, 2 L.Ed.2d 1448 (1958). Nor does a promise that a statement will not be used by one sovereign render its use by another sovereign involuntary. U.S. v. Long, 852 F.2d 975 (7th Cir. 1988).

In Long, the court noted that the often repeated quote from Bram that a confession is involuntary if it is "obtained by any direct or implied promises, however slight, [[or] by the exertion of any improper influence", Bram, 168 U.S. at 542-43, had not been applied to establish a per se rule. The court noted what it considered to be a more accurate statement of the rule as follows:

> ...where the other circumstances surrounding the confession do not suggest that the defendant's will was overborne...improper of misleading inducements make a

> confession involuntary. For example, leading the defendant to believe that he or she will receive lenient treatment when this is quite unlikely is improper, whereas making a promise to bring the defendant's cooperation to the attention of the prosecutor or to seek leniency, without more, is not. (Citations omitted).

Long, 852 F.2d at 978.

In the present cas, the police went far beyond mere exhortations to tell the truth. They simply did not state that they would inform the prosecutor of any cooperation by petitioner and recommend leniency accordingly. Rather, after indicating several times that they were basically interested in knowing who the shooter was, the police promised petitioner that if he told them the truth about the crime he would not be charged. They made this promise to petitioner after acknowledging that they had witnesses who linked him to the murder weapon and stating they believed they could prove he was at the murder scene.

It was indeed, "quite unlikely" that petitioner would "walk" and not be charged at this time. Furthermore, this promise was made after having obtained unwarned admissions, thereby "exploit[ing] the unwarned admission to pressure [petitioner] into waiving his right to remain silent". Elstad, supra, at 315. This Court finds that the promise made to petitioner in the interrogation recorded in the "Rights in Office" and "Video" audiotapes, that if he told the truth he would not be charged was improper, misleading, and induced the inculpatory statements he made after receiving Miranda warnings. Consequently, this Court finds these statements to be involuntary under the inquiry mandated by Elstad. These statements should not have been admitted at petitioners trial.9

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9. The fact that the police conditioned their promise of leniency upon verification by polygraph and that petitioner failed the polygraph test does not render his statements

Petitioner was interrogated again on April 12, 1985. This session was recorded on videotape and transcribed in writing. Petitioner was given Miranda warnings at the beginning of this session. In this session, petitioner was told that because he had not passed a polygraph exam given on April 11, 1985, he could be prosecuted. He was told that the question of his prosecution was "far from open and shut". Interrogation Transcript (Int. Tr.) at 1. After being told he had not passed the polygraph exam he was encouraged to submit to further questioning to see if "[m]aybe we can clear that up". (Int. Tr) at 2.

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9. (con't) voluntary. The promise of leniency had already had its intended effect and prompted petitioner's inculpatory statements before the polygraph test was given. The fact that the promise he would not be charged if he told the truth induced petitioner to both make inculpatory statements and to submit to a polygraph exam hardly renders the promise less coercive.

In this session, petitioner essentially repeated the admissions and denials he had made in previous sessions. This session is another warned interrogation subsequent to the initial, unwarned session. However, the admissions made in this session cannot be found to be constitutional under the Elstad doctrine, because the admissions made in this session also follow the involuntary admissions made in the "Rights in Office" and "Video" session. This April 12, 1985, session did not simply follow an unwarned, but voluntary inculpatory statement. Rather, it followed a warned, but involuntary inculpatory statement, induced by an improper promise of leniency.

Confessions subsequent to an involuntary confession are not per se inadmissible. However, there must be a "break in the stream of events... sufficient to insulate" the subsequent

confession from the coercive effect of the prior involuntary confession. Darwin v. Connecticut, 391 U.S. 346, 349, 88 S.Ct. 1488, 20 L.Ed.2d 630 (1968). There is no indication that this occurred in the present case.

The admissions made by petitioner in this last, warned interrogation session were attempts on his part to "clear up" areas where he had failed the April 11, 1985, polygraph test. His uncounseled submission to this polygraph test was itself induced by the same improper promise of leniency which prompted his admissions after receiving Miranda warnings. Thus, this last interrogation session was, in fact, a part of the "stream of events" begun by the promise of leniency made to petitioner. Consequently, petitioner's inculpatory statements made at the April 12, 1985,

interrogation are not admissible under Darwin. See also Clewis v. Texas, 386 U.S. 707, 710 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967), (stating that to be admissible, a confession made following an involuntary confession must be "insulate[d]...from the effect of all that went before.").

A panel of the Sixth Circuit has recently written that it believed Supreme Court precedent allowed application of harmless error analysis to erroneous admission of an otherwise voluntary confession obtained in violation of Miranda and its progeny, but not to a coerced confession. U.S. v. Wolf, 879 F.2d 1320, 1323-24 (6th Cir. 1989). This Court agrees. Consequently, this Court believes that because petitioner's inculpatory statements were involuntary under Bram, Brady, and the Fifth Amendment, admission of these statements could not be harmless error.

Furthermore, even where harmless error analysis applies to an unlawfully obtained confession, "'the admission of an unlawful confession [is] harmless only in limited instances, such as where there was in evidence one other lawful confession by the defendant.'" Wolf Id. at 1324, quoting Christopher v. Florida, 824 F.2d 836, 846 (11th Cir. 1987). There were no lawful confessions admitted in this case. Moreover, the other evidence against petitioner at trial, while substantial, was not massive or overwhelming. No witness was able to identify petitioner as being present at the scene of the murders. Petitioner was linked by testimony to the murder weapon and to the victims. If, arguendo, harmless error analysis did apply to the admission of petitioner's inculpatory statements, this Court could not find that admission of those statements was

"harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner has alleged that his trial counsel failed to inform him of a plea offer made by the prosecutor. He claims that this alleged failure deprived him of the effective assistance of counsel. The right to effective assistance of counsel extends to decisions of whether or not to accept plea offers. Turner v. State of Tennessee, 858 F.2d 1201, 1205 (6th Cir. 1988). Failure to communicate a plea offer can constitute ineffective assistance of counsel. Williams v. Arn, 654 F.Supp. 226, 237 (N.D. Ohio 1986). Hence, this claim is cognizable in habeas corpus. The overall issue of the effectiveness of counsel is a mixed

question of law and fact. Therefore, state court findings on the ultimate issue are not entitled to a presumption of correctness. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The Michigan Supreme Court ordered the trial court to make findings of fact on this issue. The trial court held an evidentiary hearing on August 26, 1986, to determine whether the prosecutor did indeed make a plea offer to petitioner and whether trial counsel communicated any such offer to petitioner. Testimony was taken from petitioner, trial counsel Martin Marcus, appellate counsel Suzanne Schuelke, and the assistant prosecutor at trial, Robert Agacinski. The hearing transcript is eighty-seven pages long.

The trial court judge made detailed findings of fact after this hearing. These findings are summarized as follows:

> ...it was undisputed some unknown prosecutor, at some unsure place, offered to recommend that defendant receive a 20-year minimum, and it was clear that the defendant did turn this down as he himself testified to. It is subsequent to this time that the Supreme Court apparently wants this Court to make findings of fact as to the content of the conversations between defendant's trial attorney and the assistant prosecutor who actually tried the case. Testimony was taken by this Court in this regard and there was some dispute as to the content of the conversations. This Court did indicate that defendant's counsel, Mr. Marcus, gave highly suspect testimony because of the fact that he was impeached, was not sure and changed his mind, at various times, while the testimony of assistant prosecutor who tried the case was clear and direct. It is clear, from all the testimony of the convulsants, that there never was a clear offer to defendant's counsel that there would be a sentence recommendation of a 15-year minimum term. It is obvious to this Court that it was just talk and if the defendant had indicated a willingness to plead guilty with a sentence recommendation of a 15-year minimum term, that the assistant prosecutor would take it to his superior. Specifically, in regard

> to the conversations between the defense counsel and the assistant prosecutor, it is clear from the testimony that was taken before this Court there never was an offer of a 15 year minimum term. It was all merely conversation.
>
> Findings of Fact on Remand from the Michigan Supreme Court at 1-2 (emphasis added).

The trial court also found that "[whether defendant's counsel accurately reported the contents of these 'off-the-cuff' conversations will never be absolutely certain inasmuch as the attorney has indicated that he just doesn't remember although he knows there were some conversations]". Id. at 3. Thus, the trial court did not make an explicit finding as to whether counsel informed petitioner of these plea "conversations" which it did not consider a plea offer.

Thus, the trial court found that no plea offer was made. This finding is supported in the record and is entitled

to a presumption of correctness. 28 U.S.C. 2254(d). Ordinarily, such a finding would be dispositive of this issue, for if no plea offer has been made, failure to communicate preliminary discussion or "conversations" is not ineffective assistance of counsel. Williams v. Arn, supra, at 242.

This would apparently overrule the trial court's finding that no offer had been made. However, the court went on to state further:

> Because the offer was conditional, we believe that defendant could demonstrate that an offer was made by proving by a preponderance of the evidence that he would have accepted a fifteen-year sentence and that [prosecutor] Kenny would have approved the same....We find defendant's proof concerning Kenny's approval on the offer lacking. Marcus conceded that Kenny refused to offer less than a twenty-year sentence given the heinous nature of the crimes. At most, Marcus testified that he hoped that Agacinski could convince Kenny to go lower.
>
> Id.

Thus, the Michigan Court of Appeals wrote that a conditional offer was made, that one condition of the offer was prosecutor Kenny's approval, and that petitioner failed to prove the existence of that condition. While this seems to be inherently contradictory, resolving this contradiction is not essential, for petitioner must not only prove that a plea offer was made, he must also prove that counsel was incompetent, i.e., that counsel did not communicate this plea to petitioner, and that this incompetence prejudiced petitioner. To establish the required prejudice, petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, supra, at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome."

This Court finds that both the trial court and the Michigan Court of Appeals agreed that petitioner failed to prove that Kenny, or any other prosecutor, would have approved a plea bargain for petitioner other than the twenty-year minimum sentence which he rejected. The Court of Appeals specifically wrote that Marcus, petitioner's trial counsel "conceded that Kenny refused to offer less than a twenty-year sentence given the heinous nature of the crimes. At most [Marcus] testified that he hoped that Agacinski could convince Kenny to go lower." People v. Williams, supra, at 242. Therefore, this Court finds that petitioner cannot satisfy the prejudice prong of Strickland. Even if, arguendo, a conditional plea offer was made and further assuming, arguendo, that Marcus failed to inform petitioner of this, satisfying the incompetence prong, petitioner cannot show that this incompetence prejudiced him.

In the particular circumstances of this case, petitioner would have to show some reasonable probability that Kenny would have approved a plea bargain of less than twenty years to undermine this Court's confidence in the result of the proceeding. Yet, the Michigan courts have already found as a factual matter that petitioner failed to do this. These findings are supported in the record and are entitled to a presumption of corrcteness. 28 U.S.C. §2254(d). Petitioner is not entitled to relief on this issue.

CONCLUSION

This Court has found that inculpatory statements induced by improper promises of leniency were admitted at petitioner's trial. These statements were involuntary under the Fifth Amendment and U.S. Supreme Court

precedent. This Court has further found that admission of these statements was not harmless error. This Court feels an "inevitable and understandable reluctance to exclude an otherwise reliable admission of guilt." Miller v. Fenton, supra, at 117. However, this Court is also aware that it is "...not called upon in this proceeding to pass on the guilt or innocence of the petitioner of the atrocious crime that was committed." Davis v. North Carolina, 384 U.S. 737, 739, 86 S.Ct. 439, 15 L.Ed.2d 358 (1966). Furthermore, the issue of the voluntariness of a confession must be addressed "with complete disregard of whether or not petitioner in fact spoke the truth." Rogers v. Richmond, 365 U.S. 534, 544, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961). The Constitution requires that no person be convicted on the basis of a confession which is the product of improper threats or promises or coercive conditions. Accordingly,

IT IS ORDERED that the petition for writ of have as corpus is conditionally GRANTED. Unless the State takes steps to provide petitioner with a new trial within 90 days of the date of this Order, or, should it be appealed, within 90 days of the date of affirmance on appeal, should that be the result, a writ of habeas corpus unconditionally discharging petitioner from custody on the basis of the sentence imposed in this case will be issued.

BARBARA K. HACKETT

UNITED STATES DISTRICT

JUDGE

Dated:

APPENDIX E

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiffs,

vs 85-567271

ROBERT ALLEN WILLIAMS,

Defendant.

OPINION OF THE COURT

Defendant ROBERT ALLEN WILLIAMS moved to suppress statements made by him on April 10, April 11, and April 12, 1985. An evidentiary hearing was held September 3, 1985. Defendant's motion is grant as to statements made April 11 and April 12, denied as to the statements made April 10, 1985.

Romulus police officers investigating two apparent murders had heard that Defendant might have

information about the decedents. They were admitted to Defendant's home by his mother on April 10. He was searched but was not handcuffed, and asked to come to the police station for questioning. He was not placed under arrest, but agreed to come with them and to answer questions. After approximately 40 minutes of questioning at the police station, Defendant began to implicate himself. Questioning stopped, and Defendant was given his Miranda warnings. He waived his rights and the questioning continued. He was questioned a second time on April 10, after Miranda warnings and his waiver of rights. Defendant was then lodged in jail. He was given a polygraph examination and questioned a second time on April 11. He was questioned again on the morning of April 12, and was arraigned that afternoon.

Miranda warnings are not required before questioning unless a defendant is in custody, or is the focus of the investigation. People v Blackburn, 135 Mich App 509, 517; 354 NW2d 807 (1984). To determine whether a defendant was in custody, the occur must consider the totality of the circumstances. People v Blackburn, 135 Mich App at 517-518. Here the defendant agreed to go to the police station for questioning. He was not handcuffed. Detective Sergeant Early testified that hew as not under arrest, but was free to come and go; Defendant testified that he believed he was under arrest. When Defendant began to implicate himself, questioning was stopped. He was then given Miranda warnings, and questioning continue! After he waived his rights. The Court after hearing testimony of the police officer involved and of Defendant, and after hearing the taped interview, finds that

questioning prior to the warnings was not custodial interrogation because defendant was free to leave at any time. Defendant was not the focus of the investigation until he began to implicate himself. At that point questioning stopped and he was advised of his rights and waived them. The statements made on April 10 were not improperly obtained, and are admissible.

However, following questioning on April 10, 1985 there was not sufficient probable cause to arrest Defendant. Nevertheless Defendant was lodged in jail, and was questioned twice more in addition to undergoing a polygraph examination before he was arraigned on the afternoon of April 12. Statements obtained during an unnecessary delay in arraignment, where the delay is used as a tool to extract the statements, are not

admissible. People v Mallory, 421 Mich 229, 241; 365 NW2d 673 (1985); People v Bladel, 421 Mich 39, 70; 365 NW2d 56 (1985). No facts have been offered to explain the delay in this case. The Court finds that the delay was for the purpose of extracting inculpatory statements. The statements made by Defendant on April 11 and April 12 were improperly obtained and must be excluded.

Defendant's motion is granted as to the statements made on April 11 and April 12, denied as to the statements made on April 10. An order consistent with this opinion may be presented in accordance with MCR 1985, 2.602.

SIGNED

JOSEPH B. SULLIVAN

Wayne Circuit Judge

Dated at Detroit, Michigan

September 27, 1985

APPENDIX F

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs SEPTEMBER 7, 1988
No: 97724

ROBERT ALLEN WILLIAMS,

Defendant-Appellant.

Before: H. Hood, P.J. and J.H. Gillis and M.B. Breighner, *JJ.

J.H. GILLIS, J.

Following a bench trial, defendant was convicted of two counts of first-degree murder, MCL 750.316: MSA 28.548, and felony firearm, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to concurrent mandatory life sentences for the murders to be served consecutively with his mandatory tow-year prison sentence for felony firearm. Defendant moved for a new trial, claiming that one

---

* Retired circuit judge, sitting on the Court of Appeals by assignment.

of the two felony firearm convictions which appeared on his judgment of sentence should be struck, that the trial court did not make specific findings of fact and that defense counsel was ineffective because he failed convey a plea bargain offer to defendant. The trial court granted defendant's motion to strike one felony firearm conviction, but otherwise denied defendant's motion. Defendant appeals as of right. We affirm.

In this case, Van Robin Hooper and Charles David Stanley were killed Hooper's Volvo. Hooper, seated in the driver's seat, was shot four times in the head (i.e., once in the ear, chin, forehead and right side of the head) and once in the neck. All the shots travelled from right to left. Two of the shots were close range (i.e., less than eighteen inches), Stanley, seated in the passenger

seat behinds Hooper, was hot eight times, four times in the head (once in the ear, chin, temple and eye) and once in each hand, his chest and back. One shot was at close range and two of the wounds may have been reentry wounds. The shots again travelled from right to left. Twelve nine-millimeter casings were found at the scene.

James Scamp, who lived on the road where the bodies were discovered, testified that at approximately 1:10 a.m. on April 6, 1985, he heard four or five back-firing sounds. He then heard a roaring car, gunning its engine. Hooper's Volvo had its rear flashers on, but the other car on the street did not have its lights on. The street was a dead end street and Hooper's Volvo was facings in the direction of the dead end. Scamp saw that the other car was an older dark-colored two-door Grand Torino with a

scoop hood. Scamp observed a person slowly jogging from the passenger side of the Volvo to the passenger side of the Grand Torino. The person had shoulder-length light brown hair and was wearing a thin dark-colored jacket and blue jeans. Scamp believed the person was female because of the hair, the way the body was proportioned and the jog. Because Scamp saw a white reflection on the wet pavement, he believed that the person was wearing whit-bottomed oxfords or tennis shoes. That person got in the passenger side of the Torino and the Torino drove off without its lights on. Once the Torino reached the main street, its lights came on. The bodies were discovered the next day and, when the police came to Scamp's door, he told them what he had seen.

Defendant first claims that the trial court erred when it failed to

suppress an April 10, 1985 statement he gave to the police. Defendant claims that, because he was the focus of the police investigation or was in custody when he gave the statement, he was entitled to be informed of his Miranda [v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966)] rights. Recently, our Supreme Court rejected the focus test and adopted the custody test. People v Hill, 429 Mich 382; 415 NW2d 193 (1987). To determine whether the defendant was in custody at the time of the interrogation, the totality of circumstances must be examined. People v Marbury, 151 Mich App 159, 162; 390 NW2d 659 (1986). The key question is whether the defendant could have reasonably believed that he was not free to leave. Hill, supra 399; Marbury, supra, 162. The trial court's decision regarding the admissibility of a statement will not be reversed unless it is clearly erroneous. Id. We note that his

Court defers to the trial court's superior ability to assess the credibility of the witnesses. People v Williams, 163 Mich App 744, 749-750; 415 NW2d 301 (1987).

Detective Sergeant David Early testified that he went to defendant's house because other people he had questioned told him that defendant might have information about the crime. Defendant was sleeping and his mother woke him. When defendant was probably searched before entering Early's unmarked police car. Defendant was not handcuffed. After questioning defendant, it became clear to Early that defendant may have been involved in the crime. Defendant was arrested and informed of his Miranda rights. Defendant waived his rights and continued with his statement. Early was impeached with a computer form which indicated that defendant was arrested at his residence.

Defendant agreed that he accompanied Early and his partner to the police station. Defendant testified that Early told him that he would not be charged because he was just a witness. Defendant believed that he was under arrest when he left his house. Defendant claimed that Early told him that he was under arrest when he left his house.

The court listened to a tape of the conversation between defendant and Early. The court held that defendant was not the focus of the police investigation until he made statements incriminating himself and was not in custody until he was read his rights. We Cannot say that the trial court's findings were clearly erroneous. See and compare Marbury, supra.

Defendant also claims that the trial court's findings of fact were insufficient because it declined to

decide whether defendant was the principal or an aider and abettor. MCR 2.517(A). While the prosecutor argued that defendant was either the principal (i.e., the shooter) or an aider and abettor (i.e., provided the gun and drove the getaway car with knowledge that Mark Sennett intended to kill the victims), defendant claimed that he was merely present when the shootings occurred and did not know that Sennett intended to kill the victims. Because this was a contested matter, the trial court should have decided whether defendant was the principal or aider and abettor. MCR 2.517(A)(2). However, in light of the fact that the Legislature abolished the distinction between aiders and abettors and principals, MCL 767.39; MSA 28.979, we believe that any such error is harmless.

Defendant argues that the error is not harmless because it may affect his chances for a commuted sentence. Defendant relies on People v Norman, 148 Mich App 273; 384 NW2d 147 (1986). We believe that Norman is distingush- able and, therefore, decline to remand for further fact-finding.

Further, defendant claims that the trial court erred when it denied his request for a new trial given that defense counsel failed to convey a plea bargain offer to him. In an affidavit defense counsel Martin Marcus stated that, at the beginning of trial, the prosecutor offered defendant a plea to second-degree murder with a fifteen- year prison sentence. Marcus stated that he did not relay the offer to defendant because he believed that defendant stood a good chance of acquittal.

At a hearing on the motion for a new trial, defendant testified that one month before trial, he received an offer to plead to second degree murder in exchange for a twenty-year sentence. Upon Marcus' advise, defendant declined the offer. Defendant indicated that the told Marcus in the first week he met him that he would accept a plea if the sentence was low enough. Later in his testimony defendant claimed that five, ten or fifteen years would be low enough. At defendant's sentencing, Marcus mentioned a plea bargain, but defendant did not know the details. Defendant at first testified that Marcus may have talked to him in the lock up during trial; however, on rebuttal, defendant testified that Marcus did not see him in the lockup. Defendant stated that he would have plead guilty to second-degree murder in exchange for a fifteen year sentence.

Marcus testified that defendant declined to take the first offer. Marcus then testified that on the second day of the trial there was a break in the proceedings. Marcus walked over to the prosecutor's table where Mr. Agacinski, the prosecutor, and Early were sitting. Somehow, the discussion concerning a plea came up and Agacinski indicated that a plea to second-degree murder in exchange for a fifteen-year sentence might be possible; however, Agacinski indicated that prosecutor Kenny, his superior, would have to approve such a plea. Then, the judge cam back into the courtroom. Marcus could not recall if he had mentioned the offer to defendant, although he conceded that there was sufficient time to do so. Marcus stated that he believed that he had conveyed the offer to defendant, but became unsure when defendant acted surprised when he mentioned the offer at sentencing.

Following the first plea offer, Marcus conceded that he had gone to Kenny to see if he could get a better for defendant. Kenney refused to lower the original offer, noting that a heinous double homicide was involved. Marcus further conceded that at the time he signed his affidavit that he forgot that the offer was made subject to Kenny's approval. He recalled that the offer was conditional after a later conversation with Agacinski. Marcus indicated that he did not recall talking to defendant in lockup and it was not his procedure to do so.

Suzanne Schuelke, appellate counsel for defendant, called for impeachment purposes, testified that she called Marcus in November, 1985. At the time, Marcus told Schuelke that "in the haste and confusion of coming back out and

calling Mr. Williams down, he just plain forgot" to tell defendant about the plea offer.

Agacinski testified that on the first day of trial, the proceedings did not begin at 9 a.m. Marcus approached Agacinski and asked if anything could be done regarding a plea. Agacinski told Marcus that he did not have the authority to enter into a plea, but would have to check with Kenny. Agacinski told Marcus the best he could get was a fifteen-year sentence for the murders plus two years for the felony firearm. Agacinski told Marcus that he did not want to talk to Kenny unless defendant was willing to accept such a plea. Marcus left the courtroom and was gone for about ten to fifteen minutes. Marcus returned and told Agacinski that "his man said the numbers were too high." Defendant was brought down from lockup a few minutes later.

The trial court found Marcus' testimony highly suspect, but, in any event, held that there was "never really an offer."

Although the issue has never been decided in Michigan, we agree with the many courts which have held that an attorney's failure to advise his client of a plea bargain offer may be ineffective assistance of counsel. Williams v Arn, 654 F Supp 226 (ND Ohio 1986), vacated but reinstated, 654 F Supp 241 (ND Ohio 1987), appeal dismissed, 820 F2d 1226 (1987); People v Alexander, 136 Misc 2d 573; 518 NYS2d 872 (1987); Ex Parte Wilson, 724 SW2d 72 (Tex Crim App 1987); Hanzelka v State, 682 SW2d 385 (Tex App 1984); Young v State, 470 NE2d 70 (Ind 1984); State v Simmons, 309 SE2d 493 (NC App 1983); Lyles v State, 382 NE2d 991 (Ind App 1978). We further agree that defendant has the burden of

proving by a preponderance of the evidence that a plea offer was made and that his counsel failed to communicate it to him. Alexander, supra; State v Martin, 318 NC 648; 350 SE2d 63 (1986); Young, supra.

In this case, we believe that a conditional offer was made. Because the offer was conditional, we believe that defendant could demonstrate that an offer was made by proving by a preponderance of the evidence that he would have accepted a fifteen-year sentence and that Kenny would have approved the same. Compare Arn, supra, where a conditional offer such as the one in this case was conveyed as an unconditional offer, but was revoked before trial; Simmons, supra where defense counsel failed to convey an unconditional offer because he believed it was conditional and the condition did not occur; Harris v State, 437 NE2d 44 Ind 1982), where one prosecutor stated

that given the circumstances, it would be appropriate if the defendant could plead guilty to voluntary manslaughter and another prosecutor, without authority to enter an binding plea bargain, asked one co-counsel to check with the other about the possibility of a plea. We find defendant's proof concerning Kenney's approval of the offer lacking. Marcus conceded that Kenny refused to offer less than a twenty-year sentence given the heinous nature of the crimes. At most, Marcus testified that he hoped that Agacinski could convince Kenney to go lower. As such, we affirm the trial court's opinion as reaching the right result albeit for the wrong reason.

Affirmed.

/s/Joh H. Gillis

/s/Martin M. Breighner

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs

No: 97724

ROBERT ALLEN WILLIAMS,

Defendant-Appellant.

Before: Hood, P.J. and Gillis and M.B. Breighner, *JJ.

HAROLD HOOD, P.J. Dissenting

I respectfully dissent. I would reverse and remand for a new trial on defendant's second issue, in which defendant claims his counsel did not inform him of a plea offer made by the prosecutor.

The court ordered an evidentiary hearing to determine whether the prosecutor had made an offer to plea

* Circuit judge, sitting on the Court of Appeals by assignment.

which was not communicated to defendant. At this hearing, defendant testified that some time after trial, defense counsel told him about a plead offer of second degree murder with a sentence of 15 years imprisonment, which had been made before trial. Defendant testified that defense counsel did not inform him of this offer until after trial. Defendant testified that he had told defense counsel early in his prosecution that he would be willing to plea to a five, ten or fifteen year sentence.

Defense counsel testified that on the second day of trial, during a break while the judge was out of the courtroom, the prosecutor mentioned to him that defendant could plead guilty to second degree murder, for fifteen years imprisonment. When he got back to the defense table, however, the judge entered the courtroom, they were told to rise,

and trial proceeded. At first, he did not know whether or not he told defendant about the offer, but later, defendant told him that he had not told defendant. And, he remembered that at sentencing, he told defendant that "maybe [the] 2nd degree offer that hey made during the trial with the 15-year minimum sentence wasn't such a bad idea." Defendant seemed surprised, further indicating to him that he had not previously told defendant.

Suzanne Schuelke, defendant's appellate attorney, testified that shortly after she took over the file from defense counsel, she called defense counsel and he told her that there had been a plea bargain offer made that he had not communicated to defendant, and that he felt guilty about it and thought she should know about it for appeal purposes. He told her that he "just plain forgot."

The prosecutor testified that on the first day of trial, defense counsel approached him and asked him if anything could be done as far as getting a plea. He said he had no authority to allow a plea, and that he would have to talk to his superior at the prosecutor's office. He told defense counsel to ask defendant if he was "willing to take a plea within those large numbers." He testified that defense counsel left the courtroom to talk to defendant, and returned ten or fifteen minutes later and said "the numbers were too high." The prosecutor testified that therefore, "[he] never talked to [his superior] and we never offered a plea."

Defendant testified in rebuttal that defense counsel did not come up to the lockup and tell him about the plea.

The court held that there was no actual offer of a plea. The court felt that it was "just talk, subject to approval of some higherup in the prosecuting attorney's [sic] officer." Thus, the court denied the motion.

We feel that the court erred in finding no offer of a plea. As the court properly noted, an attorney has, as a matter of law, a duty to disclose and discuss with his or her client good faith offers to settle. Joos v Auto-Owners Ins. Co, 94 Mich App 419, 424; 228 NW2d 443 (1979), lv den 408 Mich 946 (1980). When the prosecutor told defense counsel to ask defendant whether he would be willing to plead guilty in exchange for a fifteen year sentence, and offer was made about which defendant was entitled to know. Although there are no cases on point in Michigan, other jurisdictions have held that a defendant is entitled to a new trial where defense counsel failed

to communicate a plea bargain to him. See Lyles v State, 178 Ind App 398; 382 NE2d 991 (1978); State v Simmons, 65 NC App 294; 309 SE2d 493 (1983); Zelka v State, 682 SW2d 385 (Tex App, 1984). I feel that this rule is a sound one, and should be adopted in Michigan. This rule is consistent with the principle that it is the defendant's right to choose whether or not to plead guilty. See Boykin v Alabama, 395 2d 314 (1966). Defendant was entitled to hear the plea offer and decide whether he would accept it. Defendant was prejudiced by defense counsel's failure to communicate to him the plea offer.

I do not feel that the fact that the plea had to be approved by the prosecutor's superior should warrant a different result. Because it can not be determined at this point whether the superior would have approved the plea, defendant is entitled to a new trial.

/s/Harold Hood

ORIGINAL

Supreme Court, U.S.
FILED
MAR 18 1992
OFFICE OF THE CLERK

No. 91-1030

In the
Supreme Court for the United States
October Term, 1991

PAMELA WITHROW,

Petitioner,

v.

ROBERT ALLEN WILLIAMS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JAMES C. THOMAS, P.C.
By: James C. Thomas
2632 Buhl Building
Detroit, MI 48226
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Attorney for Respondent

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COUNTER-STATEMENT OF CASE

Petitioner Pamela Withrow (Warden of Michigan Reformatory) brings this Petition for a Writ of Certiorari following the grant of a writ of habeas corpus by the United States District Court for the Eastern District of Michigan and the unanimous affirmance of this ruling by the United States Court of Appeals for the Sixth Circuit. The underlying state convictions were imposed by the Circuit Court for the County of Wayne, Michigan, for first degree murder (Mich. Comp. L. §750.316), and possession of a firearm during the commission of a felony (Mich. Comp. L. §750.227(b)). These convictions resulted in an ensuing sentence of two years incarceration on the firearms violation followed by a consecutive non-parolable life sentence. This judgment and conviction was affirmed by a divided panel of the Michigan Court of Appeals and discretionary review was denied by a divided (4-3) Michigan Supreme Court.

The facts underlying the Respondent's state prosecution are as follows. On April 6, 1985 the Romulus Police Department discovered Van Robin Hooper and David Charles Stanley shot to death in Hooper's car parked on California Street in Romulus, Michigan (R. 10, TT I. 15).[1] Somewhere between April 6th and April 10th, the police heard rumors that the Respondent may have been involved in the shootings. (R.0, State Suppression Opinion).

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[1]The background facts regarding the murder are set forth in District Court's Opinion, R.28, p. 4-5.

On April 10, 1986, Romulus Police officers Early and Ondejko went to the Respondent's home. They were admitted into the home by the Respondent's mother. Mr. Williams was sleeping at the time. At the request of the police, Mr. Williams was awakened and came downstairs. At the time, Mr. Williams was in his bed clothes.

Still in bed clothes, Mr. Williams was searched but was not handcuffed and was taken to the police station for questioning. The State presented testimony that Mr. Williams was not arrested, but agreed to come to the station with the police officers. The actual voluntariness of the Respondent's accompaniment is a subject of dispute. At the state evidentiary hearing held, Respondent impeached Sgt. Early with a copy of a police computer printout which stated that Mr. Williams was arrested at his residence. Early acknowledged the printout reported that Mr. Williams was arrested at his home, but stated this was incorrect. (R. O. Evidentiary Hearing Tr. 14).

No Miranda warnings were given when the Respondent arrived at the station and questioning began.[2] The unwarned interrogation began:

> Early: For starters, you've got big problems.
>
> Williams: I do, huh.
>
> Early: Big problems. You got people that are gonna testify that put you with this gun. That are gonna testify that you had it, when you had it, where you had it.

[2]The interrogation sessions were tape recorded. These tapes were made part of the state court record.

> Ondejko: There's gonna be two life sentences here. This ain't no game.
>
> Early: We're about that far right now from getting a warrant for you. You may not have been the shooter. You supplied the gun and know what happened. We think you were probably there and we think we can prove it.
>
> Williams: Nope. I wasn't there.
>
> Early: But the main thing on this is we want the shooter. We're not real interested in who was there or who was along for the ride or anything else. We get the shooter on this and we're pretty well be content.

Session One, Audiotape labeled "Office," (Counter between approximately 028 and 079; Petitioner's App. 47a)

In the middle of the questioning, one officer asked whether he should read the Respondent his rights, but the interrogating officer indicated "not yet." After forty minutes of questioning, Respondent began to implicate himself. Questioning stopped, and Respondent was finally Mirandized. (Trial Court Opinion on Suppression Motion; Confession Tape).[3]

Petitioner was interrogated later on the 10th, and then again on the 11th and 12th. Based on the interrogations, police obtained a search warrant to search the Respondent's home for clothing and

[3]The confession tape was admitted into evidence. (see R. 10, TT I, 67). By stipulation between trial counsel, the tape was not transcribed. In the Court of Appeals, Respondent moved the Court of Appeals to enter an order requiring prosecutor to file the tapes of the confessions with the Court of Appeals as part of the record on appeal. This motion was granted, (Res. App. 1b) and the tape was subsequently filed.

weapons. Clothing was seized from the home. According to Respondent's statement, the gun was thrown into the river; it has not been recovered.

Respondent was charged with two counts of first degree murder, and two counts of felony firearm. A preliminary hearing was held and the Respondent was bound over for trial, over objections as to the sufficiency of the evidence.

On July 5, 1985 Respondent filed a Motion to Suppress the confessions and the evidence seized by the warrant. Respondent contended that: (1) he should have been Mirandized, before being interrogated; (2) That the continued holding of the Respondent without charging or arraigning him was done with the intention of obtaining a statement; and, (3) the clothing was seized pursuant to a search warrant which relied upon the improperly obtained statements. (R.0, State Motion to Suppress).

On September 27, 1985, the Wayne County Circuit Court, per Judge Joseph Sullivan, accepted Argument 2, rejected Argument 1, and did not address Argument 3. In rejecting Respondent's contentions that he was in custody under Miranda, Judge Sullivan found:

> Miranda warnings are not required before questioning unless a defendant is in custody, or is the focus of the investigation. People v. Blackburn, 135 Mich. App. 509 (1984). To determine whether the Defendant was in custody, the court must consider the totality of the circumstances. People v. Blackburn, 135 Mich. App. at 517-518. Here the Defendant agreed to go to the police station for questioning. He was not handcuffed. Detective Sergeant Early testified that he was not under arrest, but was free to come and go;

> Defendant testified that he testified that he believed he was under arrest. When Defendant began to implicate himself, questioning was stopped. He was then given Miranda warnings, and questioning continued after he waived his rights. The Court after hearing testimony of the police officer involved and of the Defendant, and after hearing the taped interview, finds that questioning prior to the warnings was not custodial because Defendant was free to leave at any time. Defendant was not the focus of the investigation until he began to implicate himself.

Respondent waived his right to a trial by jury and instead had his case presented before the Court.[4] At trial, the Respondent's defense was that he did not have the necessary intent to be an aider and abettor, and that he was merely present without criminal intent. (R. 10, TT I, 11-12).

The prosecutor contended that the Respondent was the principal who had actually fired the gun. (R. 10, TT I, 9). At minimum, the prosecutor argued that the Respondent was a knowing aider and abettor, and as such, was just as guilty as a principal. Id.

The Court chose not to settle this conflict and found that there was sufficient evidence to convict under either theory. (R. 11, TT II, 65-67). The Court convicted Respondent of two counts of felony firearm, and two counts of murder in the first degree. The Respondent was sentenced to two counts of natural life imprisonment, and two consecutive terms of two years imprisonment on the felony firearm.

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[4]The transcripts erroneously indicated that this was a jury trial.

Respondent appealed as of right to the Michigan Court of Appeals raising all of the above issues. With respect to the confession issue, the Respondent first urged the Court to reject this Court's rulings in Beckwith v. United States, 425 U.S. 341, 96 S. Ct. 1612, 48 L.Ed. 2d 368 (1970), and hold that a Defendant should be informed of his right to remain silent when subject to non-custodial police interrogation where he was the focus of the police investigation under the Michigan Constitution.[5] Alternatively, the Defendant argued that even under Beckwith, he was in "custody" for purposes of receiving of these rights. (R.0, Respondent's State Court Brief on Appeal).

In the People's Brief on Appeal, the State responded as follows:

> Defendant's first claim of error is that the trial court should have suppressed his confession because he was not given Miranda-warnings after the police investigation had focused upon him as a suspect.
>
> The issue is currently before the Michigan Supreme Court in the case of People v. Hill, Docket No. 78796, which was argued in May, 1987. As the holding in Hill will control the holding in this case, Plaintiff suggests holding the case in abeyance pending the outcome in Hill.
>
> Plaintiff notes, however, that the prevailing sentiment in this Court rejects Defendant's position -- recognizing that since Miranda v. Arizona, 384 U.S. 436 (1966), is a federal case, the federal rule should apply. See, e.g., People v. Martin, 78 Mich. App. 518, 260 N.W.2d 869 (1977); People v. Belanger, 120 Mich. App. 752, 327 N.W.2d 554 (1982); People v. Marbury, 151 Mich. App. 159, 390 N.W.2d 659 (1986); People v. M.L. Hill, 152 Mich. App. 374, 393 N.W.2d 642 (1986). And as the federal rule requires custody "to a degree associated with formal arrest" as a trigger for the application of Miranda, Berkemer v. McCarty, 468 U.S. 420 (1984), and it is clear that Defendant was not under formal arrest at the time he made his statement, it is equally clear that this claim lacks merit.

[5]Defendant-Appellant's Brief, p. 4-18. At the time, this question was pending before the Michigan Supreme Court on leave granted. The Michigan Court of Appeals opinions on the issue were divided.

Id. at 3. On November 17, 1987, the Michigan Supreme Court released its opinion in People v. Hill, 429 Mich. 382, 415 N.W.2d 195 (1987). Hill held that the Michigan Constitution's prohibition against self-incrimination was construed as its federal counterpart. 429 Mich at 393.

On September 7, 1988, the Court of Appeals in a published opinion, (Hood, P.J.; Gillis, and Breighner, J.J.) affirmed the Respondent's conviction in a published opinion, Hood dissenting. The Court of Appeals found that the trial judge had not abused his discretion in finding that the Defendant was in custody for purposes of Miranda warnings:

> Defendant first claims that the trial court erred when it failed to suppress an April 10, 1985 statement he gave to the police. Defendant claims that, because he was the focus of the police investigation or was in custody when he gave the statement, he was entitled to be informed of his rights. Miranda v. Arizona, 384 U.S. 436 (1966). Recently, our Supreme Court rejected the focus test and adopted the custody test. People v. Hill, 429 Mich. 382, 415 N.W.2d 193 (1987). To determine whether the defendant was in custody at the time of the interrogation, the totality of circumstances must be examined. People v. Marbury, 151 Mich. App. 159, 162, 390 N.W.2d 659 (1986). The key question is whether the defendant could have reasonably believed that

> he was not free to leave. Hill, supra 399; Marbury, supra, 162. The trial court's decision regarding the admissibility of a statement will not be reversed unless it is clearly erroneous.

(R. 15, Slip Opinion at 2).

After a remand to the trial court for additional fact finding regarding Respondent's ineffective assistance of counsel issue, the Michigan Supreme Court, on June 10, 1989, denied the Respondent's Petition. However, Justice Levin would grant leave to appeal on the ineffective assistance of counsel issue, Justices Archer and Cavanaugh would grant leave to appeal on both the confession issue which is now before this court as well as the ineffective assistance of counsel claim.

Respondent's pro se Petition for certiorari to this Honorable Court was subsequently denied.

Respondent's next filed a Petition for a Writ of Habeas Corpus in the Eastern District of Michigan, Southern Division. Docket #90-2289, which was granted by the Honorable Barbara Hackett, District Judge. In the Petition, Respondent again challenged the validity of his confession. The Petitioner answered asserting that under the facts of this case, the Police did not have a duty to inform the Defendant of his Miranda rights, because the Respondent was not in custody for Miranda purposes. Judge Hackett rejected this conclusion, after a complete and exhaustive analysis of the state record, she found that a reasonable person would not have felt free to leave the police station. In reaching this fact finding, Judge

Hackett indicated that she was deferring to the state court's finding of operative facts, but rejecting its conclusions of law:

> This Court believes that it must make an independent determination of whether or not Petitioner was in custody during interrogation session one. In making this determination, this Court believes that in the State court's subsidiary findings of fact there is a presumption of correctness. 28 U.S.C. §2254(d). For example, a finding that petitioner was not told he was under arrest, or a finding that petitioner was not told he was free to go, would be a subsidiary finding of fact. However, this Court believes that the overall question of whether Petitioner was in custody is a mixed question of fact and law which requires an independent federal determination. Furthermore, an analysis of the tape recording of session one will reveal, this Court also believes that if arguendo, the custody question is a fact question subject to the §2254(d) presumption of correctness, this particular state court finding is so completely devoid of support in the record that the presumption is overcome. 28 U.S.C. §2254(d)(8).

(R. 28, District Court opinion, 8-9).

Contrary to the Warden Withrow's petition (page 15), the District Court did find that admission of the statements from April 10 was not harmless error. The District Judge stated that it was her opinion that a harmless error analysis did not apply to the statements of April 11 and 12 (District Court Opinion, 27). It was her opinion that a harmless error analysis should be applied to a statement in violation of Miranda. She then proceeded to give a harmless error analysis as to all statements and to state that in any event, the statements were not harmless since no admissible statements existed and the evidence was not overwhelming. Not once

did she suggest that the analysis did not apply to the statements of the 10th.

The Petitioner also refers to a footnote of the District Court opinion. In this footnote, all the judge stated was that the April 10 statement was on two tapes, one of which was labeled a video even though it clearly was not. She also mentioned that there was a videotape of the April 12 statement. It should be noted that all of these tapes were part of the Court file as the District Court based its entire decision on the written record and accompanying exhibits, no additional testimony or exhibits were provided by either side. Furthermore, these tapes were specifically considered by the trial court. The Michigan Court of Appeals specifically granted Mr. Williams' motion to require the Wayne County Prosecutor's Office to file the tapes of his confessions and the transcripts thereof with the Clerk of the Michigan Court of Appeals for consideration.

Following the District Court's adverse ruling, the Respondent Withrow appealed as of right to the United States Court of Appeals for the Sixth Circuit. On appeal, the Appellant was represented by the Michigan Attorney General's Office and the Wayne County Prosecutor's Office. The prosecutor assigned to this appeal was also the prosecutor who represented the People of the State of Michigan in Mr. Williams' state appeal. The prosecutor divided this appeal brief into three issues. He first argued that Mr. Williams failed to raise "any Federal issue all relating to his confession" (Brief on Appeal, p.5) in the Michigan courts and thus

the matter was not properly before the District Court. He then argued that there was no violation of the Fifth Amendment. His third argument was that since Defendant had a full and fair opportunity to raise these claims in state court, federal habeas corpus review should be barred.

The Appellee, Mr. Williams filed his brief in opposition through present counsel. In addition, Mr. Williams' prior state appellate counsel (by leave of the court) filed an amicus brief in which she argued and certified that all issues had been properly federalized.

Oral arguments were held in before the Sixth Circuit Court of Appeals in Cincinnati on May 16, 1991. At that argument the prosecutor conceded that Mr. Williams federalized his confession issue. In the Sixth Circuit opinion upholding the District Court, dated September 11, 1991, the Court included a footnote stating:

> The government's brief argued that federal grounds for relief were never fairly presented to the state court for review. At oral argument, the government conceded that this position was without merit.

The Sixth Circuit further found that District Judge Hackett was correct in determining that the Defendant was legally in custody when he made a statement prior to being given Miranda rights. They also agreed that the statement given after the Miranda rights finally were recited was involuntary. The Court acknowledged that under Oregon v. Elstad, 470 U.S. 298, 309 (1985) the violation of Miranda did not automatically make subsequent statements inadmissible. Instead, as required by Elstad, the Court looked at

the facts of this case to determine whether these later statements were involuntary. The Court found that these statements were involuntary because they coerced by promises of leniency, coupled with threats of immediate imprisonment. The Court found that the Defendant reasonably expected to be released if he talked. The Sixth Circuit found that under Arizona v. Fulimante, ____ U.S. ____, 111 S. Ct. 1246 (1991), this case was subject to a harmless error analysis. However, they found that given the lack of direct evidence and the lack of any admissible statements, the improper admission was not harmless error in this case.

The Court then addressed the issue in Stone v. Powell, 428 U.S. 465 (1976); 96 S.Ct. 3037, 49 L.Ed.2d 1067, stating that the prosecution presented no reasons to extend this issue to confessions, and citing this Court's words in the recent case of Arizona v. Fulminante, supra, that "the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination".

On September 23, 1991 the Appellant filed a timely Petition for Rehearing stating that the Court had misunderstood the concession made at oral arguments. He stated that he had conceded only that Miranda issues were properly raised; not that the issue of voluntariness had been litigated. After consideration of this issue, the Court of Appeals summarily rejected this argument on October 3, 1991 and entered an order to that effect on October 11, 1991. Respondent's Petition for Writ of Certiorari follows.

REASONS FOR DENYING THE WRIT

The issues raised by the Petitioner are not appropriate for review by this Court. All of the Petitioner's issues are either case specific and/or procedurally defaulted. The Petitioner argues primarily that she lost below. She has not argued that any issues of fundamental importance to jurisprudence should be resolved. Further, the Petitioner did not properly preserve any of the issues in front of this Court.

The Petitioner's claim that the Respondent failed to preserve the issue of voluntariness was raised for the first time in the Court of Appeals and was subsequently withdrawn by the prosecutor representing Petitioner at oral arguments. While Petitioner Withrow later disputed the scope of her concession in her Motion for Rehearing, certainly the scope of the Petitioner's oral concession is best left for the judges who heard the concession. In that regard, all three judges of that Court found that the Petitioner had withdrawn the exhaustion claim in toto.

Respondent urges this Court to deny the Petitioner's writ of habeas corpus for the following reasons: (A) the issue of voluntariness was not properly raised below, the scope of the Petitioner's withdrawal of issues at oral arguments before the Sixth Circuit is a question which is committed to the discretion of the judges who heard this concession, and all issues were properly raised in state court by the Respondent; (B) Petitioner waived her argument that Stone v. Powell, supra, should be extended to preclude habeas corpus review of Fifth Amendment violations and

further this extension is not an appropriate one for this court to make; and (C) the statements given were either involuntary or in violation of Miranda.

1. Respondent Williams has not raised any issues in Federal Court that were not fully and fairly litigated in State Court and in any Event Petitioner's Exhaustion Claim Has Been Waived By Failing to Assert it in the District Court and then Conceding Exhaustion at Oral Arguments Before the Sixth Circuit.

Warden Withrow now argues that the voluntariness of the confession under the Constitution of the United States was not properly preserved for review by the Federal Court system. Respondent agrees that issues must be properly preserved, but argues that not only was the issue of the voluntariness of the confession properly preserved by the Respondent at every level; but in addition, that the Petitioner (or the State of Michigan) never raised this issue, in any form, until the decision was made by the Sixth Circuit Court of Appeals. Respondent argues that Petitioner made no distinction between preservation of voluntariness issues and preservation of Miranda issues until the Petition for Rehearing filed in the Sixth Circuit. Thus the prosecution has failed to preserve this issue for review by this Court.

In the United States District Court, the Warden filed a half page argument in answer to Defendant's entire confession issue. In this argument, the prosecution stated, correctly, that Michigan law does not require Miranda warnings for people not in actual custody (citing People v. Hill, 429 Mich. 382, 415 N.W.2d 193

(1987)) and noted that the concept of arrest was well defined. The Petitioner in no way objected to the Federal court's jurisdiction in its pleadings or in its arguments to the Court.

After losing in the District Court, a loss predicated in large part upon the involuntariness of portions of the confession, the Petitioner's argument changed dramatically. On page 5 of his brief to the United States Court of Appeals, the very first page of argument, the prosecutor stated, for the very first time:

> In this case, however, while the District Court proceeded to consider that application of Federal law to Petitioner's situation, the fact is that Petitioner never raised any Federal issue at all relating to his confession in the State appellate courts -- and, in point of fact, specifically limited his claim on appeal to State Constitutional law.

Warden Withrow's Brief to the United States Court of Appeals, Page 5. In this brief, she makes absolutely no distinction between Miranda issues and voluntariness issues, but instead argues the basic issue of federalization.

This entire argument of the prosecution was belied by all of the facts. The briefs through all levels of state court, both those of the defense and the prosecution, argued not only Miranda, but a whole spectrum of other federal cases that relate to the admissibility of confessions. Further, both the trial court and the Michigan Court of Appeal orders specifically cited Miranda. The Michigan Supreme Court denial of leave was a single paragraph that cited no cases, state or federal.

In answer to the Respondent's Petition for Writ of Certiorari to the United States Supreme Court filed by the Defendant from the Michigan Supreme Court order, the prosecution suggested that this case could be used to overrule Miranda, but never even implied that it was improperly before a Federal court.

Upon oral argument in the United States Court of Appeals, the prosecution conceded that there were federal issues ruled on by Judge Hackett were exhausted in Michigan courts. The prosecutor now states that he conceded only that Miranda issues were presented to the state court. (Petition for Writ, Page 20). Although Defendant strongly disagrees that this was the extent of the concession, even the Petitioner's own pleadings indicate that he misstated what took place at the state court level to the Sixth Court of Appeals in his brief on appeal. This was not a incidental error; it was central to the argument of the Respondent and critical to their position.

The distinction between Miranda and voluntariness now proposed by the prosection was raised for the first time in the Petition for Rehearing in front of the United States Court of Appeals. Prior to that Motion, the previously withdrawn issue was argued that Mr. Williams' failed to exhaust any Fifth Amendment challenge. No distinction were made between Miranda and voluntariness issues. In that Petition, this distinction was made for the first time. Since the exhaustion doctrine is a prudential limitation, Picard v. Connor, 404 U.S. 270, 278, 92 S. Ct. 509, 30 L.Ed.2d 438 (1971); the Sixth Circuit did not err in refusing to allow the prosecutor

to withdraw his concession and belatedly split this fine (and Respondent submits non-existent) constitutional hair. Granberry v. Greer, 481 U.S. 129, 131, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987). Petitioner engaged in a tactical decision before the Sixth Circuit, she should now be required to abide by this decision. As this Court recognized in Granberry:

> We have already decided that the failure to exhaust state remedies does not deprive an appellate court of jurisdiction to consider the merits of a habeas corpus application. See Strickland v. Washington, 466 U.S. 668, 684, 80 L.Ed.2d 674 (1984) . . . . As the Strickland case demonstrates, there are some cases in which it is appropriate for an appellate court to address the merits of a habeas corpus petition notwithstanding the lack of complete exhaustion. Although there is a strong presumption in favor of requiring the prisoner to pursue his available state remedies, his failure to do so is not an absolute bar to appellate consideration of his claim.
>
> We have also expressed our reluctance to adopt rules that allow a party to withhold raising a defense until after the "main event" in this case, the proceeding in the District Court is over. See Wainwright v. Sykes, 433 U.S. 72, 89-90, 97 S. Ct. 2497, 53 L.Ed. 2d 594 (1977). Although the record indicates that the State's failure to raise the nonexhaustion defense was the result of inadvertence, rather than a matter of tactics, it seems unwise to adopt a rule would permit and might even encourage the State to seek a favorable ruling on the merits in the district court while holding the exhaustion defense in reserve for appeal if necessary. If the habeas petition is meritorious, such a rule would prolong the prisoner's confinement for no other reason than the State's postponement of the exhaustion defense for the appellate level.

481 U.S. 132. Here, the Petitioner was aware of the exhaustion issue. While she did not raise it in the District Court, she did

raise it in the Sixth Circuit. At oral arguments, she withdrew the issue. If this is not a tactical decision, what is?

Respondent submits that the Petitioner has conceded the entire issue of federalization. It is basic law, that a party cannot appeal challenging the validity of the position to which he or she consented. See 4 C.J.S. Appeal and Error, §212, p. 617. The Sixth Circuit Court of Appeals heard the concession, they also reviewed the Petition for Rehearing where this was the only issue presented. Their quick rejection of the Petition for Rehearing is a clear indication that they were satisfied the issue had no merit. Clearly, the judges on that panel are in the best position to know what exactly occurred at oral arguments. That they unanimously denied the petition should be recognized by this court. This Court must find that the Sixth Circuit did not abuse its discretion by refusing to allow the Petitioner to withdraw her concession of an issue in a post-opinion Motion for Rehearing.

In addition, the distinction between voluntariness and Miranda the prosecution is now attempting to make is spurious.[6] Although Miranda is perceived as a safeguard against involuntary, uninteiligent, unknowing and coerced waivers, voluntariness is not a separate issue from other 5th amendment claims, since a Miranda error is merely one type of involuntary statement.

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[6]The exhaustion doctrine does not require a federal argument to be the mirror image of the state argument as long as the underlying constitutional claim is the same. Vasquez v. Hillery, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986)

Contrary to the Petitioner's argument, Miranda resounds in the 5th Amendment, not in some esoteric place of its own. The very first paragraph of that case makes this unequivocally clear. Chief Justice Warren, in the Miranda opinion also stated that, "while the confessions disallowed under Miranda were not exactly the same as those traditionally called involuntary, they were given under a type of compulsion." The use of the word traditionally is significant; under the then new test, these confessions would now be considered involuntary. However, instead of a case by case determination of the voluntariness of confessions, as had previously been the rule, the Court developed a bright line test to assist the courts in making a determination of voluntariness. If the Miranda test was not met the confession would be deemed to be involuntary:

> Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

Miranda's absolute rule (unlike that of fourth amendment's exclusionary rule), comes from the fact that a substantial number of confessions occur during custodial interrogation, which is a secret proceeding in which is extraordinarily difficult to determine the exact degree of compulsion involved. Hence, the court created a legitimate constitutional bright line to determine voluntariness. A Lowrey. Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence, 87 Mich. L. Rev 907. 925

(1989). Respondent's invocation of the evidentiary aid of the Miranda presumption of involuntariness from unwarned custodial interrogations by definition encompasses the ultimate voluntariness question on which Miranda is built.

Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed. 2d 222 (1985), does speak to some confessions that are not violations of Miranda as being involuntary; but it does suggest in any manner that voluntariness and Miranda should not be considered together. Indeed, it is only by looking at the nature of the case, that a court can determine if a statement made subsequent to a Miranda violation is involuntary.

Furthermore, in the instant case, many federal cases that dealt with a broader picture than Miranda violations were brought to the attention of the state courts. This is clear indication that Defendant's argument is based on the 5th Amendment as well as the Miranda case. Defendant's Motion to Suppress Confession/Evidence and for Evidentiary Hearing explicitly said so. Resp. App. 2b. A lengthy quote from Escobedo v. Illinois, 378 U.S. 478, 84 S Ct. 1758, 12 L.Ed. 2d 977 (1964) was presented to the Michigan Court of Appeals (Page 10 of Brief on Appeal). This quote, from a pre-Miranda case, clearly dealt with a Defendant's rights under a voluntariness analysis.

In the Michigan Supreme Court, Respondent cited the case of Bermkemer v. McCarty, 468 U.S. 420, (1984), to define the objectives of Miranda. The quote contained in the state court brief stated:

> " 'The purpose of the safeguards prescribed by Miranda are to ensure that the police do not coerce or trick captive suspects into confessing, to relieve the "inherently compelling pressure" generated by the custodial setting itself, " which work to undermine the individual's will to resist, and as much as possible to free courts from the tasks of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary." (emphasis added), at page 6-7 of the Application for Leave to Appeal to the Michigan Supreme Court.

Clearly, the distinction that the Petitioner wants to make is an artificial one that would add nothing to jurisprudence and would greatly complicate an already intricate portion of the law. Voluntariness and Miranda are intertwined and Defendant has raised them in every court from trial court to the Court in front of which we now stand.

2. The Interest of Justice Would Not Be Served By Extending Stone v. Powell to Claimed Violations of Fifth Amendment's Prohibition on Self-Incrimination. Further, Petitioner Waived this Issue By Failing to Argue it to the Lower Court.

Petitioner argues that Stone v. Powell, supra, should be extended to bar habeas corpus petitions which challenge the voluntariness of a state criminal defendant's confession.

Waiver:

The first problem with this argument is that it has not been properly preserved for review by this Court. Petitioner's untimely raising of the issue should preclude its application." Towne v. Dugger, 899 F.2d 1104 (11th Cir. 1990) (Warden's failure

to argue that Stone v. Powell should be extended to Miranda violations in District Court precluded the warden from raising the issue for the first time on appeal); Harryman v. Estelle, 616 F.2d 870, 872 n.3 (5th Cir) (en banc), cert. denied, 449 U.S. 860, 101 S. Ct. 161, 66 L.Ed. 76 (1980). See also Brewer v. Williams, 430 U.S. 387, 413-414, 97 S.Ct. 1232, 51 L.Ed.2d 423 (1977) (Powell, J. concurring) (Court will not sua sponte consider the extension of Stone where the issue is not raised by the parties).

Even addressing this procedurally defaulted issue on the merits, the Petitioner also must lose. Initially, Respondent would note that this Court has previously declined to extend Stone in Fourth Amendment context. Kimmelman v. Morrison, 477 U.S. 365, 106 S Ct. 2574, 91 L.Ed. 2d 305 (1986) (Stone does not bar a challenge to the effectiveness of a criminal defendant's state counsel where counsel failed to challenge validity of search); Rose v. Mitchell, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 737 (1979) (Stone does not bar racial discrimination claims).

Petitioner argues that a Federal court is in no better position than the state to hear these arguments.[7] However, that is not really true. Michigan has an elected judiciary that must inevitably, as human beings, consider what impact a ruling will

[7]It is interesting to note that Judge Hackett did not disagree with the state court on a point where reasonable minds could differ. She found that even if a presumption of correctness attached to the state court's findings that the Respondent was not in custody for Miranda purposes when he was woke at police request, Terry frisked, taken to the station in bed clothes, fingerprinted, and then taken into an interrogation room and questioned by two police officers, such a ruling was so blatantly incorrect that she could not defer to it.

have on the chance of being elected. The life-time appointments of the federal judiciary free them from the frailties of this consideration.

In addition, this Court clearly considers the voluntariness of confessions to be very appropriate for federal review. In the very recent case of Arizona v. Fulminate, supra, in a decision written by Chief Justice Reinquist, this court stated:

> The question of whether respondent Fulminate's confession was voluntary is one of federal law. "Without exception, the Court's confession cases hold that the ultimate issue of voluntariness is a legal question requiring independent Federal Determination.

See also Miller v. Fenton, 474 U.S. 104, 110, 105 S. Ct. 445, 882 L. Ed. 2d 405 (1985); DeAngelo v Wainwright, 781 F.2d 1516 (11th Cir. 1986) (recognizing that this Court's ruling in Miller v. Fenton implicitly rejected Stone argument).

Faulty Mathematics:

Next, the prosecutor's statement that eleven state court judges and nine court of appeals judges have already decided the issue against defendant is a misleading argument and not a correct characterization of what happened in the state court below.

It is true the trial court and two Michigan Court of Appeals judges did reject Defendant's arguments. However, the third Court of Appeals judge dissented on an issue not in front of this Court and neither accepted nor rejected the majority's opinion on the issue presented in this matter.

In the Michigan Supreme Court, three of the seven justices would have granted leave to appeal. One of these specified that

he would grant leave on an ineffective assistance of counsel issue which is not presented to this Court, but the other two justices simply stated that they would grant leave. Presumably this means on both issues presented to that Court for decision which does include the issue before this Court. Furthermore, the failure to grant leave to appeal is not a decision on the merits. Frishett v. State Farm Mutual Insurance Company, 378 Mich, 733 (1966); In Re Amendment of Platt Sequanmota Heights, 81 Mich. App. 49, 264 N.W.2d 115 (1978).

This Honorable Court denied the application for a writ of certiorari filed immediately after the Michigan Supreme Court denial of leave. However, the Petitioner's argument that this Court implicitly rejected the merits of the Petitioner's argument does not hold water here either. This Court has made it clear that denial of a writ is in no way a reflection on the merits of a case. The Court recently reiterated this principle in a habeas corpus case: "Denial of a writ of certiorari imports no expression of opinion on the merits of case." Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

Thus, there are only three judges out of eleven that have actually found the Defendant was not in custody and 4, all of the Federal judges involved, that have found he was.

Stone v. Powell:

Petitioner gives three reasons, providing no support for any, why Stone v. Powell should be extended to confession cases. These are: (1) the burden on the federal system; (2) streamlining

incarceration; and, (3) stop the eroding ability of the government to protect society.

In White v. Finkbeiner, 687 F.2d 885 (7th Cir. 1982), the Seventh Circuit considered the applicability of Stone v. Powell to Miranda issues. That court considered that issues that went to the voluntariness of confessions under the 5th Amendment were clearly cognizable under a request for habeas relief. However, it considered and rejected the idea that a Stone v. Powell analysis might be appropriate to violations of Miranda. The Seventh Circuit cited two grounds for distinguishing Miranda violations from those violations considered in Stone. First, the Miranda rule, unlike the exclusionary rule of Mapp, effectuates a significant policy beyond the deterrence of police misconduct, as it also seeks to uphold the adversarial nature of the criminal justice system.[8] Second, eliminating federal habeas corpus jurisdiction over Miranda claims would not reduce the habeas caseload as nearly every confession issue could be framed in such a manner that the question of voluntariness remained.

Petitioner at least suggests that a Stone v. Powell bar be put in front of all confessions issues, not solely violations of

---

[8]For other decisions refusing to extend Stone v. Powell to Miranda claims, see Harryman v. Estelle, 616 F.2d 870 (5th Cir. 1980), cert. denied, 449 U.S. 860, 101 S. Ct. 161, 66 L.Ed. 2d 76 (5th Cir. 1980); Patterson v. Warden, San Louis Obispo, 624 F.2d 69 (9th Cir. 1980) (per curiam); Berg v. Morris, 483 F. Supp. 179, 184 n. 3 (E.D. Cal. 1980); Wilson v. Henderson, 584 F.2d 1185, 1189 (2d Cir. 1978), cert. denied 442 U.S. 945, 99 S. Ct. 2892, 61 L.Ed. 2d 316 (1979); Smith v. Wainwright, 581 F.2d 1149, 1151 (5th Cir. 1978); Cannistaci v. Smith, 470 F. Supp. 586, 590 (S.D.N.Y. 1979); United States ex rel. Sanders v. Rowe, 460 F. Supp. 1128, 1142 (N.D. Ill. 1978).

Miranda. However, there is little doubt that this would interfere with fundamental principles of fairness since the use of involuntary confessions is criticized not only for the methods employed but ultimately goes to the actual reliability of the evidence obtained. Furthermore, in Cardwell v. Taylor, 461 U.S. 571 (1983), this Court specifically stated that while review of a confession as the fruit of an illegal arrest was prohibited by Stone v. Powell, the habeas court remained free to consider whether, "the statements were involuntary, and therefore obtained in violation of the 5th Amendment." Accord. DeAngelo v. Wainwright, 781 F.2d 1516 (11th Cir. 1986) (Stone is not applicable to voluntariness issues). Over and over, and as recently as Fulminante, the courts have stressed the role of the Federal Court in the determination of the voluntariness of confessions.

White v. Finkbeiner, clearly states the flaw in the Warden's argument that extending Stone v. Powell would reduce the burden on Federal courts. Unless extended to all 5th amendment claims, an extension clearly inappropriate for the reasons stated above, it would not reduce the burden on Federal courts, but merely cause the question to be framed in a different manner.

Warden Withrow's second claim does not make any sense. By definition, a person must be incarcerated before they can file a habeas corpus petition, Maleng v. Cook, 490 U.S. 488, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989). Therefore, the elimination of habeas avenues will not stop the incarceration of any prisoners and will

shorten the incarceration only of those that the courts found to be incarcerated under improper circumstances.

The third claim is that this type of remedy will aid the police in law enforcement. The only way this can be accomplished is if persons who have cognizable claims under Federal law are not allowed to present them to the Court. The elimination of a remedy provided by law to help the police is contrary to the entire principle of justice and fairness. Furthermore, this argument ignores the fact that despite 15 to 20 years of increasingly police oriented case law, the crime rate has not been reduced.

The voluntariness of confessions, whether considered under Miranda or directly under the 5th amendment, go to the fundamental fairness of the proceeding, not merely to the deterrence of police conduct. This Court should not entertain the Petitioner's procedurally defaulted claim that Stone v. Powell should not be extended to these circumstances.

3. A Confession is Involuntary When Induced by Principles of Leniency and, As No New Rules of Law are Involved, Neither Teague v. Lane, 489 U.S. 288 (1989), 109 S.Ct. 1060, 103 L.Ed.2d 334; or Sawyer v. Smith, 110 S.Ct. 2822 L.Ed.2d (1990), Alter this Principle.

As in the first two issues, the Petitioner presents this issue for the first time on appeal. The issue of whether promises of leniency can invalidate a confession was never raised in any fashion in the United State District Court nor in any of the state courts below. In the Court of Appeals, the Petitioner argued that

there were no promises of leniency made by the police, but the prosecution made no argument that "a Confession is not involuntary if induced by promises of leniency." Petitioner's failure to raise this issue below should bar review of this question in this forum.

In any event, the Petitioner's claim is simply without merit. Promises of leniency are clearly sufficient to invalidate confessions in certain circumstances, including the ones present in this case. The Defendant, while in the police station, was told that he would "walk" if he told the truth. He was also told: "you can talk about it now and give us the truth and we're gonna check it out and see if it fits or else we're simply gonna charge you and lock you up." (quoted from App. 48a, Opinion of District Court).

The District Court and Court of Appeals have found that the Respondent was in custody at this time and the prosecution has not challenged that finding in this Honorable Court. Both lower courts also found that Respondent faced with these statements, had a reasonable belief that he would be let go if he talked. They also found that under these circumstances the statements were invalid for both violations of the Miranda bright line rule and traditional voluntariness principles. As to the later, Judge Hackett aptly noted:

> In the context of this uncounselled interrogation, following a session where police had obtained unwarned admissions and repeatedly suggested that they were only interested in finding out who the actual shooter was, this Court finds that the statement that petitioner would "walk" if he told the truth constituted an implied promise

> of leniency sufficient to overcome petitioner's will and render his admissions involuntary. As Justice White indicated in Brady v. United States, 397 U.S. 742 (1970), in such circumstances, even a mild promise of leniency [may be] sufficient to bar the confession not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess

This statement was specifically adopted by the Court of Appeals in this matter as well. App 10a.

Contrary to the assertion of the Petitioner, the decisions of the lower courts are supported by a great many years of case law. It cannot be denied that psychological ploys standing alone are sufficient to render a confession involuntary. In Blackburn v. Alabama, 361 U.S. 199, 206, 80 S. Ct. 274, 279, 4 L.Ed 2d 242 (1960), the this court recognized that:

> A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and thumbscrew can be matched given the proper suspect by more sophisticated modes of "persuasion."

In Rogers v. Richmond, 365 U.S. 534, 81 S. Ct. 735, 5 L.Ed.2d 760 (1960), this Court reviewed a Connecticut state confession which was made in response to a police threat to bring in for questioning the Defendant's wife if he did not confess. The state court admitted the confession, holding that the threat did not impair the truthfulness of the confession. The Connecticut Supreme Court affirmed on a similar rationale. The District Court originally granted habeas corpus finding the confession involuntary. Rogers v. Cummings, 154 F. Supp. 663, 665 (D. Conn.

1956). The District Court found that when viewed as a whole, the threat served to overbear the Defendant's will. Id. at 666. This ruling was first overturned on appeal based on the fact that the Federal court should have deferred to the state court's finding of facts. However, when the case ultimately reached the United States Supreme Court, the Court held that the Connecticut Court applied the wrong standard, and that voluntariness should be determined based on the effect it had on the accused, not on whether the results were unreliable. The Supreme Court held that under these facts, a court would have been operating consistent with due process to find the confession involuntary under the Federal Constitution.

Rogers v. Richmond, involved a promise that was kept so that there is no basis or the claim that this would make a difference in the result. Furthermore, in the instant case, Defendant was not let go and no favorable results came from his statement; therefore it can hardly be compared to cases where promises were kept.[9]

In Lynmun v. Illinois, 372 U.S. 528, 83 S. Ct. 917, 9 L.Ed 2d 917 (1963), this Court overturned a state court determination of voluntariness where the police surrounded the suspect in her own home and told her that if she did not confess, her state financial

[9]United States v. Mast, 735 F.2d 745 (2d Cir. 1984), is not to the contrary. First, the Court found that the agent's promises did not cause the Defendant to speak. 735 F.2d at 750 (alternative holding). Secondly, the court specifically relied on the presence of Miranda warnings as a factor against finding involuntariness. Id. Thirdly, Mast was not subject to the rigors of a custodial interrogation at the time.

aid would be cut off and that she would have her children taken away. A unanimous Supreme Court found this statement involuntary:

> It is abundantly clear that the petitioner's oral confession was made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her if she did not "cooperate." These threats were made while she was encircled in her apartment by three police officers and a twice convicted felon who had purportedly "set her up." There was no friend or advisor to whom she might turn. She had no previous experience with the criminal law, and had no reason not to believe that the police had ample power to carry out their threats.
>
> We think it clear that a confession made under such circumstances must be deemed not voluntary. That is the teaching of our cases. We have said that the question in each case is whether the defendant's will was overborne at the time he confessed. If so, the confession cannot be deemed "the product of a rational intellect and a free will."

372 U.S. at 534.

In order for a Defendant's confession to be admissible, it must be the product of a free mind and not induced by promises or threats from the interrogators.[10] Brams v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 2d 568 (1897); Malloy v. Hogan, 378 U.S. 1 (1964); Brady v. United States, 397 U.S. 742C, 90 S. Ct. 1463, 25 L.Ed. 2d 747 (1970). Contrary to the Petitioner's assertions, this is hardly a new theory. Rather, this ruling is a

[10]The Petitioner also attacks Judge Hackett's passing assumption that the police may not have kept their promise to the Respondent. This assumption, however, is not unreasonable in lieu of the fact that the Michigan Supreme Court has explicitly held that the prosecutor's are not required to honor police induced promises. See People v. Gallego, 430 Mich. 443, 424 N.W.2d 470 (1988).

well established principle of American common law and constitutional law. In Columbe v. Connecticut, 367 U.S. 568, 602, 81 S. Ct. 1860, 6 L.Ed. 2d 1037 (1960), Justice Frankfurter recalled:

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and constrained choice by its maker?

The threats and the promises made in this case negate any serious claim that this confession was voluntary. In Womack v. State, 281 Ala. 499, 205 So.2d 579 (1967), the Defendant was also charged with first degree murder. During the course of the defendant's interrogation, the sheriff told the Defendant that "would go lighter" on the Defendant if he confessed. 205 So.2d. at 585. The Alabama Supreme Court found that the confession should not have been admitted because the sheriff's statement was designed to "give a defendant a real hope for lighter punishment." 205 So.2d. at 589. See also State v. Thomas, 148 Ariz. 225, 714 P.2d 395 (1986) (confession was inadmissible where the police officer "did not promise anything" but suggested things would probably go easier on him if he confessed); Mitchell v. State, 24 So.2d 312 (Miss. 1898) (telling suspect "that it is best to tell the truth" was an implied promise of leniency under circumstances). Sgt. Early's promise to Mr. Williams that he "would walk" certainly rises to this level.

Similarly, many courts around this country have found a plea involuntary when based on an implied promise not to prosecute a third party. In State v. Shaw, 115 Idaho 461, 767 P.2d 836 (Idaho

App. 1989), the Court found the Defendant confession invalid where the interrogating prosecutor took a confession where the Defendant's mother had also been arrested for the crime and where the Defendant was pleading for leniency for her. Despite the fact that the prosecutor skillfully avoided promising leniency, he did tell the Defendant that it "was time to talk." After an emotional plea for leniency, the Defendant confessed. The Defendant's mother was released on her own recognizance after the statement.

The Idaho Appellate Court found other these circumstances the confession should not have been admitted:

> The cumulative impact of Davis's pending release from prison, Shirley Davis's coincidental incarceration, the timing of Davis's interrogations, the subtle references to Shirley Davis's plight during those interrogations and the fact that Shirley Davis was released shortly after her son's confession, manifest coercive--although discreet--behavior on the part of the investigating officers.

767 P.2d. at 840.

The Fourth Circuit reached a similar conclusion in Ferguson v. Boyd, 566 F.2d 873 (4th Cir. 1977) (en banc). There, the Petitioner was arrested for the breaking and entering of a gun store. Petitioner invoked his right to counsel and refused to speak with the police or the prosecutor. Petitioner, however, told the police that he would confess if they let his girl friend go. (She had been arrested in the car where the stolen guns were being carried to). Ultimately, the prosecutor either agreed or told the Defendant that he would consider it. Although, there was a factual dispute on this point, and the Fourth Circuit felt that it did not

need to be resolved. Rather, the Court found that the statement should be judged from the point of view of a reasonable suspect. The Court found that it would not have been unreasonable for the Petitioner to have viewed this as a promise that girl friend would be set free. 566 F.2d at 876. Viewing matters as a whole, the Court found the confession involuntary. Id. at 878. See also Stokes v. State, 289 Md. 155, 423 A.2d 552 (Md. App. 1980) (promise to not charge Defendant's wife rendered Defendant's statement and resulting evidence inadmissible); Jarriel v. State, 317 So.2d 141 (Fla. App. 4th Dist. 1975) (invalidating confession because the Defendant was told that his wife would be charged if he did not confess); Hall v. State, 266 N.E.2d 16 (Ind. 1971) (promise not to charge the Defendant's wife made confession inadmissible); Hammer v. Commonwealth, 207 Va. 135, 148 S.E.2d 878 (1966); Brown v. State, 132 S.W.2d 15 (Ark. 1939) (invalidating a confession in part because of implied promise not to prosecute the Defendant's wife).

Additionally, the interrogation took place in the police station without relatives or counsel present is another factor to be considered in determining the voluntariness of the confession. In Miranda v Arizona, 384 US 436, 86 S Ct 1602, 16 L.Ed. 2d 694 (1966), Justice Warren, quoting with Inbau & Reid, Criminal Interrogation and Confession (1962) and O'Hara, Fundamentals of Criminal Investigation (1956), (two common police manual's on interrogation techniques), noted the coercive effect that was gained by removing the Defendant from the home, under ordinary circumstances:

> "The officers are told by the manuals that the 'principal psychological factor contributing to successful interrogation is privacy -- being alone with the person under interrogation.' The efficacy of this tactic has been explained as follows:
>
> > 'If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior within the walls of his home. Moreover, his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggest the invincibility of the forces of the law.'

See also Commonwealth v. Haas, 373 Mass. 545, 552-553, 369 N.E.2d 692 (1977) (A "station house atmosphere is generally most conducive to successful interrogation because the investigator 'possesses all the advantages'"). In this case, the Defendant was seized from his home in the middle of the night in bed clothes and transported to the police station for an incommunicado detention, and was not even given the benefit of a statement of his rights. These factors further compound the voluntariness issue.

Finally, the Petitioner cites Teague v. Lane, supra, and Sawyer v. Smith, supra, for the principle that collateral review is not an appropriate forum for new rules of law. While that is clearly the holding of these cases, it bears no relationship to the case at issue. As the many state and federal cases cited above

make clear, there is no new rule of law even suggested, only the very old one that promises of leniency make a confession invalid. The lower courts in this case were correct that the statements made were involuntary and their decisions should be affirmed.

CONCLUSION

This case does not involve questions of national significance. The underlying ruling of the Sixth Circuit is sound and fully in line with established constitutional precedents. The Petitioner's proposed expansions of constitutional and habeas corpus law were not presented to the District Court or the Sixth Circuit. This Court should find these claims procedurally defaulted and decline to review this case.

WHEREFORE RESPONDENT prays that this Court DENY the Petitioner's Petition and allow the decision of the United States Court of Appeals for the Sixth Circuit to stand.

Respectfully submitted,

JAMES C. THOMAS, P.C.

BY: _____

JAMES C. THOMAS, ESQ.
2632 Buhl Building
Detroit, MI 48226
(313) 963-2420
Attorney for Respondent

No. 91-1030
In the
Supreme Court for the United States
October Term, 1991

PAMELA WITHROW,

Petitioner,

v.

ROBERT ALLEN WILLIAMS,

Respondent.

PROOF OF SERVICE

BONNIE TESSIER says that on the 18th day of March, 1992, she served a copy of Motion for Leave to Proceed in Forma Pauperis, and Respondent's Brief in Opposition to Petition to Writ of Certiorari upon

Jeffrey Caminsky, Assistant Prosecuting Attorney, 12th Floor, 1441 St. Antoine, Detroit, MI 48226

by mailing the same to him in a sealed envelope, properly addressed, with postage fully prepaid thereon, and by depositing the same in the United States Mail at Detroit, Michigan.

_____
Bonnie Tessier

Subscribed and sworn to before me
this 18th day of March, 1992

_____
Sheryl Filauro
Notary Public, Macomb County, MI
(Acting in Wayne County)

My Commission Expires: April 4, 1995

BEST AVAILABLE COPY

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the 28th day of October in the year of our Lord one thousand nine hundred and eighty-seven

Present the Honorable
Richard M. Maher
Presiding Judge
Myron H. Wahls
Joseph B. Sullivan
Judges

Docket No. 97724
L.C. No. 85-567271

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT ALLEN WILLIAMS,

Defendant-Appellant.

In this cause a motion to compel filing of exhibits is filed by defendant-appellant, and no answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion to compel filing of exhibits be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that plaintiff-appellee file a copy of the taped confession with the Clerk of the Wayne County Circuit Court forthwith for purposes of transmitting same to this Court and that plaintiff-appellee furnish written notice to defendant-appellant of this filing.

STATE OF MICHIGAN--ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 3rd day of November in the year of our Lord one thousand nine hundred and eighty-seven.

Chief Clerk

Respondent's Exhibit 1

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

667,321,450

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

-vs-

Case No. 85-567271

ROBERT ALLEN WILLIAMS,
Defendant.

MARTIN B. MARCUS, P-34234
Attorney for Defendant

JUL 03 1985

MOTION TO SUPPRESS CONFESSION/EVIDENCE AND FOR EVIDENTIARY HEARING

NOW COMES Defendant herein, ROBERT ALLEN WILLIAMS, by and through his attorney, MARTIN B. MARCUS, and says unto this Honorable Court as follows:

1. That the Defendant is currently charged with two counts of Murder I, and two counts of Felony Firearm; contrary to MCLA 750.316 and 750.227(b).

2. That the Defendant was arrested on the above charges on April 10, 1985, at his residence and without a warrant, by the Romulus police.

3. That on April 10, 1985, the Defendant was questioned and made statements to the Romulus police concerning his involement in the above charges.

4. That on April 11, 1985, the Defendant was given a polygraph exam by the Michigan State Police, and made statements concerning his involvement in the above charges.

5. That on April 12, 1985, the Defendant was again questioned by the Romulus police, and the Defendant made statements concerning his involvement in the above charges. This conversation was taped and transcribed, and a copy is provided with this Motion to the Court.

6. That based on information provided by the Defendant, a search warrant was issued for Defendant's residence; and pursuant thereto, certain items of clothing were recovered.

7. That at the time of Defendant's arrest, the arresting officers did not have probable cause to arrest the Defendant.

8. That the above statements of the Defendant were involuntary in nature and were taken in violation of Defendant's rights under the 4th, 5th and 6th Amend. of the U.S. Constitution, and the corresponding sections of the Michigan Constitution.

9. That an evidentiary hearing is necessary in order to determine the circumstances under which the aforementioned confession/evidence was obtained and in order to determine whether the evidence in question should be suppressed.

Respondent's Exhibit 2

NO. 91-1030

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PAMELA WITHROW,

Petitioner,

v.

ROBERT ALLEN WILLIAMS, JR.

Respondent.

PROOF OF SERVICE

STATE OF MICHIGAN)
COUNTY OF WAYNE)ss

The undersigned deponent, being duly sworn, deposes and says that she served a true copy of: **PETITION FOR WRIT OF CERTIORARI**

upon: Robert A. Williams (Pro Per)

the within named Petitioner in pro per, and Attorney General's Office by depositing said pleading in the U.S. Mail, in the City of Detroit, enclosed in an envelope bearing postage fully prepaid on December 10, 1991, plainly addressed as follows:

Robert A. Williams
#137866
P.O. Box 500
Ionia, Michigan 48846

James L. Stropkai
Office of Attorney General
720 Law Building, 535 W. Ottawa
Lansing, Michigan 48913

Joycelyn Hammons
JOYCELYN HAMMONS

And said pleading was filed in the Supreme Court of the United States by DEPOSITING IN THE U.S. MAIL on December 12, 1991 addressed as follows:

JOSEPH F. SPANIOL, JR., CLERK
Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

Timothy A. Baughman
TIMOTHY A. BAUGHMAN

Subscribed and sworn to before me
this 10th day of December, 1991.

Joyce Nelson DeVoll
Joyce Nelson DeVoll
Notary Public, Wayne County, Michigan
My commission expires: 9/7/93

RECEIVED
DEC 12 1991
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

PAMELA WITHROW,

Petitioner, No. 91-1030

vs.

ROBERT ALLEN WILLIAMS, JR.,

Respondent.
/

CERTIFICATE OF SERVICE

BONNIE TESSIER says that on the 16th day of January, 1992, she served a copy of Notice of Appearance upon: Timothy A. Baughman, 1441 St. Antoine, Detroit, Michigan 48226 by mailing the same to him in a sealed envelope, properly addressed, with postage fully prepaid thereon; and by depositing the same in the United States Mail at Detroit, Michigan.

Bonnie Tessier
Bonnie Tessier

Subscribed and sworn to before me
this 16th day of January, 1992

Sheryl Filauro
Sheryl Filauro
Notary Public, Macomb County, MI
(Acting in Wayne County)

My Commission Expires: April 4, 1995

SUPREME COURT OF THE UNITED STATES

PAMELA WITHROW,

Petitioner,

vs.

ROBERT ALLEN WILLIAMS, JR.,

Respondent.

No. 91-1030

RECEIVED
JAN 23 1992
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NOTICE OF APPEARANCE

NOW COMES James C. Thomas, P.C., pursuant to Rule 9 of the United States Supreme Court and hereby files his Notice of Appearance as Counsel for Respondent, Robert Allen Williams, Jr.

Respectfully submitted,

JAMES C. THOMAS (P23801)
Attorney for Defendant
2632 Buhl Building
Detroit, MI 48226
(313) 963-2420

Dated: January 16, 1992

Supreme Court, U.S.
FILED
JUN 11 1992
OFFICE OF THE CLERK

No. 91-1030

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

PAMELA WITHROW,
Petitioner,

vs

ROBERT ALLEN WILLIAMS, JR.
Respondent.

ON WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
SIXTH CIRCUIT

JOINT APPENDIX

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

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Chief of Research,
Training and Appeals

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DANIEL P. O'NEIL
Attorney at Law
309 E. Front St.
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Michigan 49685
Phone:
(616) 929-9700
Counsel for
Respondent

*Counsel of Record

Petition for Certiorari filed
December 12, 1991
Certiorari Granted April 20, 1992

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7/5/85	Respondent files Suppression Motion in Wayne County Circuit Court
9/3/85	Evidentiary hearing on Suppression Motion
9/27/85	Suppression Motion granted in part and denied in part
10/28/85	Trial commences
10/29/85	Respondent convicted of two counts of first-degree murder, two counts of felony firearm
11/6/85	Trial Court sentences Respondent to two concurrent terms of life imprisonment, and two consecutive terms of two-years imprisonment for felony firearm
12/18/86	Trial Court vacates one count of felony firearm on Respondent's motion
9/7/88	Michigan Court of Appeals affirms Respondent's conviction
6/9/89	Michigan Supreme Court denies parties leave to appeal.
11/9/89	United States Supreme Court denies Respondent's petition for writ of certiorari
12/7/89	Respondent files Petition for writ of habeas corpus in United States District Court (ED Mich)
4/14/90	Petitioner files Response to habeas petition

10/29/90	District Court enters opinion and order conditionally granting writ of habeas corpus
11/1/90	District Court enters judgment
11/16/90	Petitioner files notice of appeal
9/11/91	Sixth Circuit Court of Appeals affirms granting of writ
10/3/91	Sixth Circuit denies Petitioner's motion for rehearing
10/11/91	Sixth Circuit enters judgment
12/12/91	Petitioner files Petition for writ of certiorari with United States Supreme Court
4/20/92	United States Supreme Court grants certiorari

SUPPRESSION MOTION

STATE OF MICHIGAN

IN THE CIRCUIT COURT

FOR THE COUNTY OF WAYNE

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Circuit Court

No. 85-567271

vs

ROBERT ALLEN WILLIAMS,

Defendant.

MARTIN B. MARCUS P-34234

Attorney for Defendant

MOTION TO SUPPRESS CONFESSION/EVIDENCE AND FOR EVIDENTIARY HEARING

NOW COMES Defendant herein, ROBERT ALLEN WILLIAMS, by and through his attorney, MARTIN B. MARCUS, and says unto

this Honorable Court as follows:

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7. That at the time of Defendant's arrest, the arresting officers did not have probable cause to arrest the Defendant.

8. That the above statements of the Defendant were involuntary in nature and were taken in violation of Defendant's rights under the 4th, 5th, and 6th Amend. [sic] of the U.S. Constitutino, and the corresponding sections of the Michigan Constitution.

9. That an evidentiary hearing is necessary in order to determine the circumstances under which the aforementioned confession/evidence was obtained and in order to determine whether the evidence in question should be suppressed.

* * *

[3]

Detroit, Michigan

Tuesday, September 3rd, 1985

10:15 o'clock a.m.

* * * *

THE CLERK: Docket No. 85 567-271, People versus Robert Allan Williams.

MR. MARCUS: For the record, Martin Marcus on behalf of Mr. Williams.

MR. JANICE: And I'm Lee Janice from the prosecutor's office.

THE COURT: All right, gentlemen.

Your motion, Mr. Marcus.

MR. MARCUS: Yes, Your Honor, today we are here on motion to suppress statements made by the defendant, along with some evidence which was seized based on this statement.

MR. JANICE: I'm ready.

THE COURT: Fine. You may proceed then.

THE COURT: Raise your right hand, sir.

DAVID EARLY

called as a witness by the Plaintiff, being duly sworn by the Court, was examined and testified as follows:

THE COURT: Please take the stand.

MR. MARCUS: Your Honor, before the witness starts to testify, let me ask, there is another officer. If he's going to testify, we ask he wait outside.

MR. JANICE: Sounds good to me. May I proceed.

THE COURT: Please do.

MR. JANICE: Thank you.

DIRECT EXAMINATION

BY MR. JANICE:

Q. Would you tell us your name, please?

A. David Early

Q. What do you do for a living, Mr. Early?

A. Detective-Sergeant with the Romulus Police.

Q. Are you one of the officers who is with that department, who is

investigating the deaths of Van Hooper, and is it David Stanley?

A. Correct.

Q. And during the course of that investigation, did you come in contact with Mr. Robert Williams?

A. Yes, sir, I did.

Q Do you see Mr. Williams in court today?

A. Yes, I do. Seated in the gray and black Tee Shirt.

Q. The REO Speed Wagon Tee shirt?

A. I can't see down that far. Yes.

MR. JANICE: May the record reflect witness identified Mr. Williams.

Q. Now, where was it you came in contact relative to this case?

A. My first contact was at his home in Taylor.

Q. And why was it you went to his home in Taylor?

A. I had interviewed a number of

witnesses previous to Mr. Williams in order to gather information on this case, and I was told by more than one that Mr. Williams might have information pertaining to it.

Q. Did you have information that Mr. Williams had been acquaintance of the deceased?

A. Yes, I did.

Q. What happened when you went to Mr. Williams' home?

A. I went to Mr. Williams' home. His mother answered the door. I had been there previous and left a card, and asked him to contact us, us being myself and my partner, and then finally I stopped by again. His mother let us in and informed us that Mr. Williams was in bed sleeping.

Q. Had Mr. Williams contacted you?

A. No, he had not.

Q. So you find out he was at home

sleeping. What happened from that point on?

A. At that point I advised his parents that I wished to talk to him, question him regarding this matter, and they said they would get him out of bed, and my partner waited while he got dressed and cleaned up.

Q. And what was the nature of your conversations with Mr. Williams at the house?

A. At the house Mr. Williams appeared more or less as if he were expecting. He informed his parents, he said, well they're questioning everybody else, they're going to question me too.

I asked Mr. Williams to company my partner and me to the police station. He agreed. We walked him to the police car and went to the police station.

Q. At that time was Mr. Williams under arrest?

A. No, he was not.

Q. He was free to go if he chose?

A. He was free to go or refuse.

Q. And at that point in time, were you focusing your investigation on Mr. Williams?

A. At that point in time it was not focused on him, no.

Q. So you got in the police car, went down to police station. What happened?

A. Then we went into my office in the Detective Bureau, began talking with Mr. Williams, who stated that he knew who had committed the murder, and started relating to us the facts as he claimed he knew them.

Q. I assume that perked up your interest to say the least?

A. Yes, sir.

Q. Now, what happened during that conversation?

A. Well, as the conversation went on,

the facts that were being related to me by Williams, did not fit with information that we knew already and had confirmed.

Q. In what respect?

A. In respect to other witnesses we interviewed, and the story Mr. Williams was telling us, as far as cars involved and time periods, and as Mr. Williams continued to talk it began to look like he had more than passing interest and was actually involved.

I would say it was approximately 20 minutes into the interview where Mr. Williams began to implicate himself. At that point we stopped the interview and advised the Miranda. Mr. Williams acknowledged he understood, and wished to continue with the statement.

Q. When you say you advised him of his Miranda to him, how exactly did you do

that, and what did you say?

A. I read the rights off the prepared form in the police department. It matches card I carry in my wallet if you need exact words.

Q. Would you tell us the exact words relative to the rights he had under the constitution?

A. I would have to read them off the card to get them exact.

Q. Would you do that?

A. As I think of it, this is revised the car. I think the form of the wording is slightly different

Q. Do you have your form with you?

A. I can check my file.

Q. I will get it.

A. This was taped recording. We also have the tape recording, Miranda and stuff.

Q. Do you have all the conversations on tape?

A. Yes, I do.

Q. Maybe I can get back to that in a moment, and we can just use the tape later on.

A. All right.

Q. You indicate it was approximately 20 minutes after the beginning of your conversation with him that you became suspicious that he might be involved?

A. Correct.

Q. So at that point you advised him of his Miranda rights?

A. That's right.

Q. And what happened from that point on?

A. From that point on he began to tell of his involvement in it, and actually being present at the scene at the time of the shooting, and then subsequently I also advised Mr. Williams that he was being placed under arrest.

Q. Now, at any point did you ever threaten Mr. Williams?

A. No, sir.

Q. Did you ever make any promises of any kind to Mr. Williams?

A. The only promise or statement of that type given Mr. Williams was that if he was only a witness with no involvement, he most likely would not be charged in the case, but then subsequently came to the point where he was definitely more than witness, and also polygraph examination was involved. We stated that he would have to pass polygraph examination and did not.

Q. At what point in time did you tell him that if he was just a witness he probably would not be charged?

A. I believe that was -- well, that was about midway through the conversation. I can't recall if it was before or after Miranda. There were probably three subsequent interviews after that. Each time Miranda advised.

After that we went over the same statements.

Q. When you interviewed Mr. Williams initially, at that time -- by the way what date was that?

A. That was on the -- April 10.

Q. Did you threaten Mr. Williams in any way?

A. No there was no threats.

Q. Coerce him in any way?

A. No, sir.

Q. Was there any indication to you that he was under the influence of narcotics or liquor or anything of that kind?

A. No, sir.

Q. Did he appear to be lucid?

A. Yes, he did.

Q. Was there any indication to you that he did not understand his Miranda rights?

A. No, on the contrary, elaborated that he understood them.

Q. Did you read each right aloud to him?

A. Yes, I did.

Q. And you indicated that you had initial interview on tape; is that correct?

A. Yes, sir.

Q. When was the second time you talked to Mr. Williams?

A. This interview took place in the morning of the 10th. I again interviewed him in the afternoon. The following morning he went to the Michigan State Police where there was a polygraph and interview done, and he came back to the station later in the day and was again interviewed at the police station.

Q. You did two interviews on the 10th yourself?

A. Correct.

Q. And then you did one interview on the 11th?

A. Correct.

Q. Each time --

A. I believe there was another one done on the 12th. Each time he advised of Miranda, and each Time it was recorded.

Q. Did you use the same procedure to advise him of his rights each time?

A. Yes, I did.

MR. JANICE: It's my understanding in speaking with defense counsel, Your Honor, that defense counsel is contesting the admissibility of the second, third and fourth statements only, in that they were the product of the first statement, which they claim to be illegal; is that right:

MR. MARCUS: That's correct.

BY MR. JANICE:

Q. Now, you indicated you had the first statement on tape?

A. Yes, sir.

Q. Do you have that with you?

THE COURT: Now, referring to the one of the 10th?

MR. JANICE: Yes.

A. I have the tape. We've got about 30 minutes on the first tape. Then it goes on into the second tape. It's second tape where the Miranda rights were given.

Q. Have you had a chance to review that tape?

A. Yes, I have.

Q. And whose voices are contained on that tape?

A. On that tape is myself, Officer Michael and Denko and Mr. Williams.

Q. And is that tape an accurate reflection of the totality of your conversation with Mr. Williams?

A. Yes, sir.

Q. Has it been altered in any way?

A. No, sir.

Q. Is it complete?

A. It is complete.

MR. JANICE: I'd move for its admission, subject to any voir dire by defense counsel.

THE COURT: Mr. Marcus?

MR. MARCUS: No objections, Your Honor.

THE COURT: It may be admitted. This is the first interview of April 10?

THE WITNESS: Correct.

THE COURT: The tape is being admitted without objection. Is the tape it's own record or will it be necessary to transcribe the tape as it's played?

MR. JANICE: I am sorry, Your Honor.

THE COURT: Will the tape serve as it's own record, or do you need a transcript of the tape recorded?

MR. JANICE: I would be satisfied the tape serves as it's own record.

MR. MARCUS: I agree.

THE COURT: All right, thank you. You don't need to take it.

(Tapes played.)

MR. MARCUS: Excuse me, Your Honor, I think we got to the point that is necessary for the hearing. The rest of it just goes

into the statements.

THE COURT: Okay. Any further questions?

MR. JANICE: I don't have any further questions.

THE COURT: Mr. Marcus?

MR. MARCUS: Yes.

CROSS-EXAMINATION

BY MR. MARCUS:

Q. Officer Early you said you went to Mr. Williams house on April 10. That was a Wednesday wasn't it?

A. I don't recall.

Q. Okay.

MR. MARCUS: Okay, Your Honor, I would ask the Court to take judicial notice, if you would, that was a Wednesday April 10th, 1985. I've already checked that.

THE COURT: all right, I'll accept your word.

BY MR. MARCUS:

Q. Okay, what was the reason you went to

Mr. Williams?

A. Was information that he had made statements that he knew about Stanley being murdered, and other witnesses that said they knew Williams had information. At one point, information that Mr. Williams had the gun involved, at one time.

Q. Did you have a warrant for Mr. Williams at that time?

A. No, that's not true.

Q. Well, how did he get down to the police station?

A. He rode in the back seat of my unmarked car, unhandcuffed.

Q. Did you search him before he went into the car?

A. I believe we probably did. That would be almost standard procedure.

Q. Okay, Officer, I'd like to show you a copy of this document, and see if you know what that is? Do you recognize that?

A. Yes, I do.. It's called an UD 103.

Q. What is the purpose of that?

A. All this is, to submit the computer information. At the top of the boxes are filled in. That's the computer information. It goes into Lansing. At the bottom we fill in a brief summary for our own records.

Q. That brief summary which says, information, on the bottom. Now it says arrest, and what does it say after that?

A. It says subject arrested by Sgt. Early, P. O., and Denko at residence.

Q. Is that a date?

A. 4-10-85.

Q. Are you saying it's incorrect?

A. I am saying it's a summary. It states in my actual report that he was picked up at the house, and questioned, and later questioned at the police station, after being picked up on the --

Q. One report says he was arrested at police station. This report says he was arrested at residence?

A. This report is for the computer, doesn't reflect any details.

Q. It does say he was arrested at his house?

A. Yes, it does says that on here.

Q. All right. Now, the first tape we heard when Mr. Williams was questioned, at that time he was not read his Miranda rights; is that correct?

A. At the initial start of the tape no., sir.

Q. But you went to his house and picked him up on the 10th, you did have information that he may have been involved in this crime somehow as accomplice?

A. Or had information pertaining to it, yes.

Q. What was the date that Mr. Williams

was arraigned on, do you know?

A. The 12th.

Q. Okay, so that was -- that was three days after he was arrested, because if I'm correct, correct me if I'm wrong, you said after you questioned him on the 10th, and his story did not jibe, so to speak, you told him he was arrested then, and read him his Miranda rights?

A. Correct.

Q. And after you read him his Miranda rights, you questioned him; is that correct.

A. That's correct.

Q. Okay, and was he questioned on the 11th also?

A. The 11th, I believe we went to the Northville State Police, where he was questioned by polygraph examiner.

Q. Okay. And how about on April 12, was he questioned on that day also?

A. On the morning of the 12th, he was

again advised by Miranda, and I questioned him, and that is the tape which we have transcribed.

Q. Okay, and that was all before he was arranged; is that correct?

A. Correct.

Q. Did you ever tell Mr. Williams that if he cooperated with you and told you everything he knew, that he would only be a witness, and not charged with this crime?

A. I told Mr. Williams that if he was a witness, and had no active part in the crime, and that could be confirmed by polygraph, that he would not be charged.

MR. MARCUS: I have no further questions of this witness.

THE COURT: Anything further on redirect?

MR. JANICE: No, sir.

THE COURT: You can step down, thank you.

(Witness excused.)

THE COURT: Anything further on redirect?

MR. JANICE: I don't have anything further, Your. Honor.

THE COURT: All right. Mr. Marcus?

MR. MARCUS: Yes, Your Honor. For the purposes of the hearing only, I would call Mr. Williams to the stand.

THE COURT: Mr. Williams, come forward please. Raise your right hand.

ROBERT A. WILLIAMS

the defendant, called as a witness in his own behalf, being duly sworn by the Court, was examined and testified as follows:

THE COURT: Please take the stand.

DIRECT EXAMINATION

BY MR. MARCUS:

Q. Please state your name for record?

A. Robert Williams.

Q. Okay. Mr. Williams, do you recall the date on April 10, when Officer Early and his partner came to your house?

A. Yes, I do.

Q. What happened when they came

A. My parents woke me up and told me two detectives wanted to question me. I got up and got dressed and come downstairs.

Q. Okay, and did the officers say anything to you there?

A. They asked me to come with them to the police station, that they was going to question me there.

Q. And You rode in the police car to the police station?

A. Yes.

Q. Did they search you before you went into the car?

A. Yes, they did.

Q. Did they handcuff you in the car?

A. No.

Q. You rode in the back the police car?

A. Yes.

Q. What happened when you got to the police station?

A. We were talking, and we started talking, and about 20 minutes after we were talking, Sgt. Early said something to Mike about reading him his rights, and lying, and he started to say something about my rights, and I said, well, I'm being arrested now because I didn't know something, and he says, yeah, and he stopped, and then we went on talking.

Q. Okay. Did you ever request attorney at that time?

A. No, not at that time.

Q. During your questioning, or before you were questioned, at any time, did the officers make any promises or deals with you?

A. Well, they told me I wouldn't be charged with nothing. They said I would just be witness for my testimony statement, and they said that, and then they left and said, well, talk to Sgt. Early. He said he talked to the

prosecutor and agreed with him.

Q. Agreed to what?

A. That I wouldn't be changed with nothing.

Q. And what was your part of the deal, not to be charged, what did you have to do?

A. Testify and make a statement against the murder.

Q. Okay, against who?

A. Mark Sennett.

Q. And did you do that?

A. Yes, I did.

Q. Okay, when Officer Early took you from your house on the 10th, April 10 did you think you were under arrest at that time?

A. Yes, I did.

Q. Okay, and you were at the station, and they questioned you for around 20 minutes before they read you your Miranda rights?

A. Oh, it was longer than that before we read the rights, and we were taking, and Mike started to say something. He started to say, well, okay you have the right.

I says, oh, now I'm being charged, now you are going to put me under arrest, and Sgt. Early says, I got news for you, you been under arrest since you left the house.

Q. Were you aware all your conversations were being taped?

A. No. I wasn't.

Q. Did you ever see the tape recorder?

A. Yes, I did, Friday afternoon.

Q. Okay, but not on Wednesday?

A. No, I didn't.

Q. And you were questioned again on April 11?

A. Yes, I was.

Q. Okay, that was before you went to court?

A. Yes, I wasn't arraigned until about 4

o'clock Friday afternoon.

Q. Okay, did you understand your rights when the officer read them to you?

A. Well, yes, more or less.

Q. All right.

A. Really wasn't -- wasn't thinking too clearly. I was nervous.

Q. Okay. I have nothing further.

MR. JANICE: Just a few questions.

MR. JANICE:

Q. Mr. Williams, you ever been convicted of felony previously?

A. Yes, I have.

Q. And could you tell us what and when?

A. Breaking and entering, '76.

Q. Anything else?

A. Receiving and concealing stolen property in '74.

Q. Anything else?

A. I believe there was attempted B and E.

Q. When was that?

A. '74. All those else were '73 actually.

Q. Anything else?

A. Another B and E. I think that's it.

Q. When was that?

A. '76.

Q. Anything else since then?

A. How many -- I think there was six. They were all break and entering and receiving and concealing stolen property.

Q. When was the last one?

A. '76.

Q. So you have six prior felonies?

A. Yes.

Q. Is this the first time in you life, when you're being questioned by these Romulus police officers, that you have ever been advised of your rights, or had you been advised of your constitutional rights before?

A. Yes, several times.

Q. This was not an unfamiliar procedure to you then?

A. No, but I just don't pay no attention

to them. Half the time I only get bits and pieces.

Q. After you heard them so many times you could probably recite them by heart, could you not?

A. No.

MR. JANICE: I have nothing further.

MR. MARCUS: I have nothing.

THE COURT: Thank you. You may step down, Mr. Williams.

(Witness excused)

THE COURT: Argument, gentlemen?

MR. MARCUS: Yes, Your Honor. We would ask that the confessions of the defendant, or the statements of the defendant be suppressed in this matter. We find about four problems here.

First, as the police report indicates, but Sgt. Early says it was incorrect, says defendant was arrested at his residence on April 10. This was a warrantless arrest, Your Honor, and it was a routine felony arrest. They could have obtained a

warrant. This causes arrest to be illegal under Payton vs. New York. An illegal arrest, there is a taint.

Also it was arrest without probable cause.

Once he was arrested the defendant was taken down to the police station. Officer Early testified that they had some information thinking that the defendant may have been an accomplice in this matter. The focus was on the defendant. He was questioned without Miranda warnings. It was after they elicited the information they wanted that they stopped the questioning, and then gave the defendant his Miranda warning.

As the defendant stated, and officer also stated, there were promises of leniency here. Told the defendant if he would tell them what happened that he would only be a witness in this case. The defendant told him what happened. They turned around and they're prosecuting the

defendant now. The officer also indicated, the officers left and talked to the prosecutor, and he would only be a witness if he testified in this matter.

Under People versus Conte, 365 NW2nd 648, the Court -- the Supreme Court announced the test for confessions or admissions where there's been promises of leniency, and its subjective test as to what the defendant believed. He felt that he was told he was going to be a witness. Based on that he told the officers what he had to say.

The biggest problem we find, Your Honor, is the delay in arraignment. Defendant was arrested on the 10th without a warrant. The case I would cite would be People versus Mallory, 365 NW2nd 673, which states that when a person is subject to felony arrest without warrant, the person must be brought promptly before a magistrate for the arraignment on the complaint and warrant.

Here he was arrested on the 10th. He was questioned on the 10th. He was questioned on the 11th and he was questioned on the 12th, and it wasn't until the afternoon, around three or 4 o'clock, before the court closed on the 12th, that he was taken over for arraignment.

I think on its face, the delay in arraignment was so the officers could question the defendant, and obtain these confessions, and based on that, Your Honor, we would ask that the Court throw out the confessions -- or the statements. I wouldn't want to call them confessions. Defendant never admitted committing a crime, only being there, and being in possession of evidence of a shirt and some gym shoes, which were taken from the defendant's house, which I suspect the prosecution would use at trial, and that was based on information given not statements.

MR. JANICE: In analyzing this, I

think that the issue has to be broken down into two time frames. I think the period from the initial contact with Mr. Williams up until the time he's advised of his Miranda rights is one time frame we have to look at, and then, secondly, we have to look at what happened from the point in time where he is advised of his Miranda rights.

In terms of the initial contact with Mr. Williams, up until he's advised of his Miranda rights, there are two issues I think to be determined. One was there a requirement that the police advise him of his Miranda rights, and secondly, was any statement made by Mr. Williams at that point in time voluntary.

I suggest to the Court that the questions can be answered by looking at the particular sequence of events as viewed by both the police officer and Mr. Williams himself.

It appears clear that neither the

police officers nor Mr. Williams initially viewed him as a defendant at that time.

We look at the conduct of the police officer when they came in contact with Mr. Williams. They did not act in a manner which would be consistent with a person being under arrest. They didn't handcuff him, put him in the car. It appears that they were merely bringing him down to the police station to see if he had any additional information which might help him find the perpetrator, and it appears that they think that it's Mr. Sennett who is in fact the prime suspect in this case.

Further, in looking at what happens as that initial statement goes along, the question then becomes at what point in time were the police obligated to inform Mr. Williams of his Miranda rights, and that certainly is a factual determination that the Court has to make, based upon the totality of the circumstance, based upon what's said by each party, and how it's

said, and that's something which I trust the Court will view fairly.

Irrespective through of how the Court views that initial statement when Mr. Williams is advised of his constitutional rights, I would suggest to the Court that even if the Court finds the statement up until that point, either non-voluntary or such that he could have been advised of his Miranda rights, I would suggest to the Court that that doesn't taint what would be said, once he is advised of his constitutional rights.

It could have been that the police officers may have made a mistake in not advising him of his rights prior to that, but once they did, and once Mr. Williams was aware that he no longer has to say anything, from that point then the police have fulfilled their constitutional duty, and whatever is said from that point on would be admissible.

Certainly the Court must take into

consideration that Mr. Williams is not a person who is unfamiliar with this sequence of events. He indicated that he had been advised of his Miranda rights many times and -- and in having gone through this procedure a number of times, clearly Mr. Williams is cognizant of the fact that he does not have to say anything further, and if he does say anything further, it's at his own peril.

As I understood from defense counsel, that the issue in terms of this hearing, in terms of the subsequent statements was only that they were products of the prior statements. Perhaps in testimony we did not deal as completely as could have been, with why he was not arraigned on the 12th, until the 12th, but in looking upon the facts of the case, it becomes clear why he was not arraigned until the 12th.

We know that the police had offered for him to take a polygraph exam with the State Police. That was done on the 11th,

and therefore that would have precluded the possibility of Mr. Williams being arraigned on the 12th. Further, I don't think that that means when they offer Mr. Williams the opportunity to take a polygraph, that the police can no longer have any contact with him up until -- up until the point of his arraignment.

THE COURT: Well, why was he arraigned at 4 o'clock on the 12th? Why couldn't he have been arraigned in the morning of the 12th?

MR. JANICE: Well, that's a point we never got into the hearing, Your Honor, because defense counsel had never indicated to me, that was not an issue at the hearing. IF the Court feels it is necessary to get into that, I would gladly do so now.

THE COURT: I think it is.

MR. JANICE: All right. Can I have just a second before we --

THE COURT: Certainly.

MR. JANICE: It would take me about 30 seconds. I'm sorry. Get back on.

DAVID EARLY

having been previously sworn to tell the truth, resumed the witness stand and testified as follows:

THE COURT: The officer is still under oath.

THE WITNESS: Yes, sir.

DIRECT EXAMINATION

BY MR. JANICE:

Q. The testimony we have from you up until this point, regarding Mr. Williams, is that you came in contact with him on the 10th; is that correct?

A. Yes, sir.

Q. You took one statement. Then you advised him of his rights and took subsequent statement; is that correct?

A. That's correct.

Q. Did you take any more statements on the 10th.

A. Yes, sir.

Q. You took one statement. Then you advised him of his rights and took subsequent statement; is that correct?

A. That's correct.

Q. Did you take any more statements on the 10th?

A. No, sir.

Q. You had indicated in your conversation with Mr. Williams that he would be given an opportunity to go to the State Police and take a polygraph?

A. Yes, sir.

Q. And was that actually arranged to be done?

A. That was arranged to be done to take place on the 11th.

Q. And did Mr. Williams indicated he wanted to take polygraph or he did not was to take polygraph?

A. He indicated he wanted to take polygraph.

Q. And when was the polygraph exam actually scheduled with the State

Police?

A. For the morning of the 11th.

Q. And was he taken out to the State Police Post?

A. He was taken to the State Police Post by my partner Officer Denko.

Q. What time was the actual polygraph actually given?

A. It was scheduled to be given at 9 o'clock, 10 o'clock in the morning.

Q. When did it end?

A. Best I recall they returned about one o'clock to the station.

Q. After one o'clock did you have any further conversation with Mr. Williams?

A. Yes, I did.

Q. Why did you have further conversation?

A. Because he had not passed the polygraph, and I attempted to discuss with him what reasons he thought he had not passed, if he did tell the truth.

Q. When you indicate that he had not passed, are you indicating, to the polygraph examiners that he was not involved?

A. The polygrapher offered number of questions as to who the shooter was, and according to the report I received back, the polygraph said they were deceptive answers.

Q. When did you find that out?

A. Afternoon of the 11th.

Q. Did you immediately confront Mr. Williams with that?

A. Yes, sir.

Q. What happened from that point on, on the 11th?

A. The remainder of the afternoon, or part of the afternoon, Mr. Williams took us to different places to show us occurrences that had happened, and also where, to the best of his knowledge, a gun had been thrown in the river.

Mr. Williams stood by there along with sheriff divers to assist in locating the weapon that was supposedly thrown in there.

Q. By whom?

A. That was thrown in the water by Mr. Williams. We did not clear there until probably five, six in the afternoon.

Q. And was it possible to arraign him at the point in time on the 12th?

A. No, Sir.

Q. I mean on the 11th?

A. No, sir.

Q. Now on the 12th, what occurred?

A. The morning of the 12th I had conducted another interview with Mr. Williams, after we had not found what we were supposed to in the river, and asked him if one more time he would go through the story, and we gave him Miranda rights again and went through the whole story.

Q. What time of day was that?

A. This was the morning of the 12th. Immediately after that I then went to the Prosecutor's Office with the warrant request.

Q. And was a warrant request approved?

A. Yes, it was.

Q. And what time did you get that?

A. After lunch, the prosecutor usually breaks out there about 11:30 until 1 or so for lunch hour. Arraignments are 9, 11 or 2 o'clock.

Q. So he was arraigned at what time?

A. Attempt was made to get there fore the 2 o'clock. I believe we were somewhat later.

Q. Going back to the 11th, you indicated he went out to the waterfront with you with the divers?

A. Correct.

Q. Did you remain there were Mr. Williams until the divers completed their search?

A. We remained for a couple of hours. Then finally I had Mr. Williams brought back to the station. I remained until the divers were relatively done. I think it started nightfall and the divers were almost finished.

Q. You were looking for gun?

A. Yes.

Q. You did not find it?

A. No, sir.

Q. The next morning did you tell Mr. Williams you did not find it.

Q. Did you ask him then if he wanted to talk any more?

A. Yes.

Q. What did he say?

A. He indicated he would.

Q. And that's how the final statement on the 12th came about?

A. That's correct.

MR. JANICE: That's all.

CROSS-EXAMINATION

BY MR. MARCUS:

Q. Okay, Officer. Mr. Williams was arrested on the 10th though; is that correct?

A. Yes, sir.

Q. He could have been arraigned on the 10th; is that correct?

A. No, sir. It was late on the 10th when we finally decided he was under arrest, and at that time it was not possible to get to the prosecutor's office and the court, et cetera.

Q. Well, Mr. Williams, even after he would have been arraigned, could have come and taken lie detector test; is that correct?

A. No, it's pretty much policy, prosecutor out there, we won't go with Polygraph after the warrant itself. Pretty much polygraph before the warrant.

Q. So you wanted to get polygraph before he was arraigned, because it's the prosecutor's policy not to give a warrant?

A. The prosecutor has the policy and its pretty much the officer. Whether to get warrant.

Q. As officer do you know there is a statute which calls for the defendant to be arraigned without undue delay?

A. Yes, sir.

Q. You didn't wasr't to arraign him on the 11th because you wanted him to take polygraph?

A. It was agreed between myself and Mr. Williams that a polygraph should be taken.

Q. It's a prosecutor's policy not to take polygraph after the defendant has been arraigned?

A. To the best of my knowledge, yes.

Q. Is the prosecutor's policy not to look for evidence, like a gun that's been

thrown in the river, until after the defendant's arraigned? They won't look for evidence; is that the prosecutor's policy?

A. I don't think I said anything --

Q. No, I am just asking.

A. I don't know --

MR. JANICE: How can he tell us the prosecutor's policy?

THE COURT: Sustain the objection.

BY MR. MARCUS:

Q. There was one day, what was the it, the 12th? What day was it you went to the river, 11th or 12th?

A. That was the 11th.

Q. Why wasn't he arraigned on the 11th?

A. I was working as fast I could, counsel.

Q. Okay. You thought it was better to go look for the evidence than to arraign the defendant?

A. There again, we were working within certain time limitation, and there was myself and one other officer investigating the case, yes.

MR. MARCUS: I have nothing further, Your Honor.

THE COURT: Anything further?

MR. JANICE; Nor have I.

THE COURT: You may step down, thank you. Pardon me. One question. What time was it on the 10th you told the defendant he was under arrest?

THE WITNESS: The exact time, I couldn't tell you, Your Honor, but it was in the afternoon.

THE COURT: Thank you.

MR. MARCUS: Your Honor, as to the delay in arraignment, I don't know of anything in the statute that says if there's a polygraph in the future, or the next day, or something, that the defendant should not be arraigned.

It is the defendant's right to be brought before the Judge, told what he's charged with. If there is a bond, to set bond. There is nothing in the statute that says you can delay the arraignment because they want a polygraph, or because they want to look for evidence.

As a matter of fact that is the wrong reason to delay arraignment. The statute says defendant arrested -- in case law, that if the defendant is arrested without warrant, he has a right to arraignment without undue delay.

They have waited three days here. They used the wait to gather evidence, and to question the defendant, and he was questioned repeatedly on the 10th, on the 11th. On the 12th they took him in for polygraph. Whether or not he agreed to it he had a right to immediate arraignment if possible.

Again the other arguments, the prosecutor brought up something in his

counter argument about the timeframes. I believe if the Court wants to check, being People versus Blackburn, 354 NW2nd 807.

THE COURT: Would you give me the Michigan citation, please?

MR. MARCUS: I'm sorry, Your Honor. I don't have that. It will have to be converted. It was '84 case from the Michigan Court of Appeals, which states that if the defendant is not given his Miranda warnings and gives a statement, and then right after he's given Miranda warnings, that that does not remove the taint, until there is some period of delay.

Here he was questioned and given the Miranda warnings required and gave the same statements. Based on that case, Your Honor, the statements that follow are still no good.

THE COURT: Give me that Northwest cit and I'll convert.

MR. MARCUS: People versus Blackburn, 354 NW2nd 807.

And again just to reiterate, Your Honor, there was promises of leniency, that that's a subjective test from the case I stated, People versus Conte, which was released March 19th, 1985 which says it's subjective test. If the defendant gives a statement because of those promises, then the statements are involuntary, and cannot be used for any reason, not even impeachment, Your Honor.

Defendant was arrested as the officer said. They -- excuse me, Your Honor. The prosecution said he wasn't arrested at his house on the 10th. Well, for a witness to be patted down and put into the back of the police car, I don't know if it's standard police procedure. I don't know if they do it in Romulus.

THE COURT: Isn't it standard procedure to handcuff a person who is arrested?

MR. MARCUS: They do that, Your Honor. I have to agree the defendant felt he was

under arrest. It was definitely custodial investigation. The manner of the questioning by the officers indicated they felt Mr. Williams was involved. He was the focus and did not give information until after the information they wanted. That was violation of his rights, Your Honor.

THE COURT: Well, let me take a look at your case, plus three others I have here that I want to check.

MR. JANICE: Could we approach the bench for just a second, Your Honor?

THE COURT: Certainly.

(Sidebar conference.)

THE COURT: As the prosecutor must be excused at this point, and between the prosecution and defense, I have been given now five cases they wish me to read, we are going to adjourn this, until when?

MR. JANICE: Whenever is convenient with the court and defense counsel, because I appreciate both of you letting me go to the dentist.

THE COURT: Well, let me read the cases, and I'll call you gentlemen as to what date you can get back.

MR. JANICE: Fair enough.

(The proceedings were concluded on this date)

TRIAL COURT ORDER AND OPINION
GRANTING IN PART,
AND DENYING IN PART,
MOTION TO SUPPRESS EVIDENCE

See Petition, Appendix E.

[October 28, 1985, 155]

(About 3:01 A.M.)

MR. AGACINSKI: At this time we wish to recall David Early, Your Honor, to go into the other area of examination.

THE COURT: Sure.

DAVID EARLY

recalled as a witness by the People, having been previously sworn by the Court, was examined and testified as follows:

THE COURT: You are still under oath, Sergeant Early.

THE WITNESS: Yes sir.

DIRECT EXAMINATION (continued)

BY MR. AGACINSKI:

Q. Your name again is what?

A. Sergeant David Early.

Q. The same David Early who testified this morning.

A. The same one.

Q. I am going to hand you what has been marked People's Proposed Exhibit Number 9 and ask you if you can

identify that exhibit?

A. Yes, I can.

Q. What is that exhibit?

A. This is the envelope that I sealed three casings that I found on Zeeb Road and I-84. I wrote the Romulus Police case number across the top, location Zeeb Road and I-94, the date 4-13-85 and my initials.

Q. Is your handwriting still on the exhibit?

A. Yes, sir, it is.

Q. Those are the three casings you talked about that you found on or about April the 13th when you went there with Mr. Daly?

A. Yes, sir.

Q. After you recovered them you turned those over to the Northville State Police Department?

A. They were sealed in the envelope and turned over in their sealed form to the lab.

Q. These same envelopes you have turned over to them?

A. Yes, sir.

Q. You also indicated this morning that you first met Mr. Robert Williams on April 10th, 1985?

A. That's correct.

Q. And where did you first met Mr. Williams?

A. At Mr. Williams' house in Taylor.

Q. And who went with you to Mr. Williams' house in Taylor.

A. Officer Ondejko.

Q. And were you there to arrest Mr. Williams at that time?

A. No, sir.

Q. What did you at that time?

A. At that time we were granted admission to the house by Mr. Williams' father and we asked to talk to Mr. Williams regarding this case.

Q. Did you ask to talk to him at the house or someplace else?

A. We asked him to accompany us to the police station.

Q. You asked the father...?

A. Asked Mr. Williams. I am sorry.

Q. What did he say to your request?

A. Mr. Williams indicated he had more or less been waiting for us to contact him, that he knew we were coming up to talk to him and he agreed to accompany us to the police station.

Q. To the Romulus Police Station?

A. To the Romulus Police Station?

Q. What time did you arrive at the Romulus Police Department?

A. I don't remember the exact time. Probably the early afternoon.

Q. Of April 10th.

A. Of April 10th.

Q. And at that time was he under arrest?

A. No, sir.

Q. Did you talk to him about the deaths of Mr. Van Hooper and Mr. David Stanley?

A. Yes, I did.

Q. Did there come a time when you read him his Miranda rights?

A. Yes, sir, I did.

Q. How long had you been talking to him when you read him his Miranda rights?

A. I would say approximately 35 to 40 minutes at the police station.

Q. You had been talking for that time before reading the Miranda rights?

A. Yes, sir.

Q. Was that conversation up to the point of the Miranda rights recorded in any way.

A. Yes.

Q. How was it?

A. It was recorded on a cassette recorder which sits on my desk.

Q. At some point you did advise him of his Miranda rights?

A. That's correct.

Q. How did you advise him of his Miranda rights?

A. I read them off a standardized waiver of rights form that we have at Romulus. Myself, I have a copy in my pocket.

Q. Could you indicate or read into the record what you read to Mr. Williams after your 35-minute or 40-minute conversation.

A. Yes, sir.

It reads: You are being questioned in regard to your participation or knowledge of a criminal complaint. You understand that, one, you have the right to remain silent; two, anything you say can and will be used against you in a court of law; three, you have the right to have an attorney present before and during the time you answer any questions or make any statements; four, if you cannot afford an attorney, one will be provided for you by the court without cost prior to

answering any questions or making any statement; five, do you understand your rights that I have explained to you?

Q. And did he indicate?

A. At that time Mr. Williams indicated that he did understand his rights and did not wish any attorney at that time.

Q. And was the beginning of the Miranda warnings also placed on tape?

A. Yes, sir.

Q. That tape is still available, is it not?

A. Yes.

Q. After reading Mr. Williams' his Miranda rights, then what happened?

A. Then I continued questioning Mr. Williams about the events of the Friday before the homicide or the Friday of the alleged homicide and the events of the day and evening.

Q. What did he tell you had happened?

A. He had said that he had gone to his brother's house and his brother -- at his brother's house he had met Mr. Sennett and they had left together, he and Mark Sennett, and they had driven around eventually met up with Van Hooper and David Stanley.

Q. Did he say where they met up?

A. I believe he first met them in from of Hooper's residence.

Q. You believe that's what he told you or that's what you believe happened?

A. I believe that's what he told me. In front of Hooper's residence.

Q. What did he say after he met up with these two men in front of Mr. Hooper's residence?

A. At that point Mark Sennett had gotten into the car with Hooper and Stanley.

Q. That is what Mr. Williams told you?

A. That's what Mr. Williams told me.

Q. And then what did he say happened?

A. He said from there Mr. Williams went over to Jerry Woods' house and was to meet up with Mark Sennett later. From there Mr. Williams indicated he went to Jerry Woods' house and was unsure where Mark Sennett and the other two had gone.

Q. What did he say after that happened?

A. After that he stated after watching TV for sometime at Jerry Woods' house, Mark Sennett and Hooper and Stanley arrived driving a black Volvo and at that point Mark Sennett indicated to Mr. Williams that he wished Williams to follow him.

Q. Then what did he say?

A. He said they then left Jerry Woods' residence and drove to the City of Romulus, stopped on a dead end one-way street in there he stopped the Torino behind the Volvo, Mark Sennett had come back to the Torino and spoke with Bobby Williams.

Bobby Williams said there was a comment made to the effect: Shall I use a knife or should I use a gun? And at that point Sennett went back up to the Volvo.

Q. Did Mr. Williams say what was the response made to that question?

A. He did not. Mr. Williams indicated that he had existed the Torino for a minute and his hat had blown off and he was in the process of retrieving his hat and getting back in the Torino when Mr. Sennett came up and said this to him.

Q. He said Mr. Sennett said what to him?

A. Should I use a knife or should I use a gun? And at that point Sennett went back up to the Volvo.

Q. Did Mr. Williams say what was the response made to that question?

A. He did not. Mr. Williams indicated that he had existed the Torino for a minute and his hat had blown off and

he was in the process of retrieving his hat and getting back in the Torino when Mr. Sennett came up and said this to him.

Q. He said Mr. Sennett said what to him?

A. Should I use a knife or should I use a gun.

Q. Did Mr. Williams say if he gave an answer to that?

A. No, he did not.

Q. Then what did Mr. Williams say?

A. Mr. Williams said he got back in the Torino and started to turn the car around, that he had been told by Mr. Sennett to turn the car around.

Mr. Williams stated that as he was turning the car around, he heard what sounded like gun shots, he saw what he believed to be muzzled flashes from inside the Volvo.

Q. Then what did Mr. Williams tell you?

A. Mr. Williams then indicated that Mr.

Sennett jumped back into the Torino and told him to drive.

Q. Then what did he say happened? What did he say?

A. He said from there they went back to Mr. Sennett's residence and while there, Mr. Sennett changed his clothes, asked Mr. Williams to help him clean up his jacket, and from there they again left in the Torino and drove down to the river to discard the clothing and the gun.

Q. Did Mr. Williams say whether he helped Mr. Sennett clean up the jacket?

A. Yes. He said he sat at the table and cleaned the jacket.

Q. Did Mr. Williams say how they got to the river to get rid of the items?

A. Mr. Sennett drove the car down to the river because Mr. Williams stated that while they were driving, Mr. Williams threw Sennett's boots out the window.

Q. Mr. Williams said he threw the boots out the window himself?

A. Yes.

Q. That's what he said to you?

A. Yes.

Q. What else did he say, if anything?

A. He also said when they stopped down by the river, Mr. Williams indicated that Mr. Williams got out of the car and walked up to the edge of the river and threw the gun as far as he could.

Q. Mr. Williams said he threw the gun into the river?

A. That's correct..

Q. That's what he told you that first day?

A. Yes, sir.

Q. Did he say anything else at that time?

A. At that point he indicated they went over to Shelby Singleton's house and--

Q. Who did he say?

A. The two of them, Sennett and Williams.

Q. That's what he said?

A. Yes. Bobby Williams indicated he didn't know Mr. Singleton that well and after that they then returned back to -- Mr. Williams returned back to his own house where he walked over and spoke to Frank Daly and Mr. Sennett then left driving the Torino.

Q. Did Mr. Williams say anything else then about the death of Mr. Van Hooper or Mr. David Stanley at that point?

A. Not from that point. No, sir.

Q. During that conversation did he say anything as to why these two men died? Did he offer any explanation as to why he claimed Mr. Sennett acted?

A. Not in that conversation. No, sir.

Q. Was that conversation also tape recorded?

A. Yes, sir.

Q. That's still available?

A. Still available.

MR. AGACINSKI: If I may have one moment, Your Honor.

Q. During the course of this first discussion with Mr. Williams, right after giving his Miranda rights the first time that you described it, did Mr. Williams talk at all as to what happened or any conversation between himself and Mr. Sennett or when Mr. Sennett first drove up in front of Mr. Woods' house? Do you recall that first discussion?

A. No. I don't have an independent recollection of what was said.

MR. AGACINSKI: I have no further questions, Your Honor.

CROSS-EXAMINATION

BY MR. MARCUS:

Q. Officer Early, how long did you question Mr. Williams on that day?

A. During that conversation, approximately 50 minutes.

Q. Fifty?

A. Approximately.

Q. Was that conversation recorded?

A. Yes.

Q. You have a copy of that recording here, don't you?

A. Yes.

Q. Okay. Well, what you described as the conversation only took you about 15 minutes, ten minutes.

Was there more to that conversation which you didn't tell this Court?

A. There was approximately 35 minutes of conversation leading up to the point where Mr. Williams was Mirandized and most of what was said during that statement was late told by Mr. Williams either to be untrue or not relevant to the case. And what I repeated afterwards is basically a summary of facts that Mr. Williams said.

Q. So it's a summary of what he said. Do you have any notes, written notes of what he said?

A. No. I am going by strictly recollection at this point.

Q. So there are some things that were left out, is that correct?

A. Exact wording and exact details, probably, yes.

Q. But you have an exact conversation on the tape with you today, don't you.

A. Yes, I do.

MR. MARCUS: Your Honor, I would ask that the Court would listen to that tape.

THE COURT: Sure. Why don't you mark it as an exhibit, then we can go in chambers and listen to it or here.

MR. AGACINSKI: The defendant, I guess, has to be present. That's the only problem. However it's best with the Court.

THE COURT: Okay. We can play it right here.

THE WITNESS: You want the tape in its entirety or from Miranda on?

MR. MARCUS: In its entirety.

MR. AGACINSKI: It's about 50 minutes.

THE COURT: Fifty minutes?

MR. AGACINSKI: Five-0 minutes. Yes.

THE COURT: Okay. My suggestion is to mark it as an exhibit and then perhaps we can stipulate that the reporter won't have to take it down. Can we do that?

MR. AGACINSKI: I have no objection. I think that is a fine procedure.

MR. MARCUS: Agreed, Your Honor. No objection.

THE WITNESS: If I may. Mr. Marcus, you have a direct copy of the tape which doesn't have as much background, which is clearer.

MR. MARCUS: I have no problem with that.

MR. AGACINSKI: I have no problem. After he hears the tape, he can testify that's a reproduction of the entire conversation.

THE COURT: You do have one clearer than the other?

THE WITNESS: Yes. The copy made for

Mr. Marcus was on a different recorder which has less background noise.

THE COURT: Okay. You do have the other one just in case?

THE WITNESS: Yes.

THE COURT: Let's mark the clearer one. I like to listen to clear tapes.

(The People's Proposed Exhibit No. 10 was marked for identification by the Reporter.)

MR. MARCUS: I believe that's all the evidence that will be brought up today.

THE COURT: Okay. Bring him right back. As soon as you bring him back, we will be ready to go.

THE SHERIFF: All rise. This court is in recess. (A recess was had at about 3:18 P.M.)

- - -

(After recess, the Court, all counsel and the defendant present at about 3:28 P.M.)

THE SHERIFF: All rise. This court is in session. Please be seated.

THE COURT: Do you want to have him identify the tape?

MR. AGACINSKI: I think so. It is for the defense but I think that would be the best way, to identify the tape. I think he produced it himself for the defense.

THE WITNESS: That's correct.

THE COURT: We marked it People's Exhibit 10. Do you want to mark it as the defendant's exhibit?

MR. MARCUS: We can leave it.

THE COURT: You want to have him identify it?

MR. AGACINSKI: I will do that. Okay.

REDIRECT EXAMINATION

BY MR. AGACINSKI:

Q. Sergeant Early, you testified that the recording -- that the interview you conducted with Mr. Williams was put on tape; is that correct:

A. That's correct.

Q. You have an object in you hand marked People's Proposed Exhibit Number 10?

A. Yes, sir.

Q. What is that?

A. This is an exact copy of the original tape which I made for the defense.

Q. How did you make that copy?

A. I made that copy on my own personal cassette to cassette recorder which duplicates tapes.

Q. Did you have a chance to listen to all or part of that tape?

A. I have not listened to the entire copy but it was directly off the original which I did listen to in its entirety.

Q. You listened to part of this tape?

A. Yes. I listen to part of this tape to make sure the clarity was there.

Q. The clarity was there and it was recorded properly?

A. Yes.

Q. I wonder if you might play the tape for the Court. Afterwards we will ask you if that does indeed capture the entire conversation you had with Mr. Williams.

But before listening to the tape, I will ask you: Did anybody else take part in the conversation that was recorded on the tape between you and Mr. Williams?

A. Present during the entire interview was myself, Mr. Williams and Officer Mike Ondejko.

Q. Did he also speak?

A. Yes. He did. There will be three voices on the tape.

MR. AGACINSKI: That's it as far as foundation.

THE COURT: You are offering People's Exhibit 10 then?

MR. AGACINSKI: Yes, Your Honor.

THE COURT: Any objection?

MR. MARCUS: No objection.

THE COURT: All right. May be received.

(The tape, People's Exhibit 10, was played from about 3:30 P.M. until about 4:11 P.M.)

* * *

THE COURT: Stop the tape. I think we will recess until tomorrow at it 9 o'clock.

MR. MARCUS: If I may, I believe that was the end of the tape.

THE WITNESS: I believe that was the end of the tape.

THE COURT: Oh, good. Turn it on again.

THE WITNESS: Shall I go on?

THE COURT: Yes. Just to be sure.

THE WITNESS: That would be the end of it.

THE COURT: Okay. Fine. We will recess until tomorrow morning at 9 o'clock.

THE SHERIFF: All rise. (The trial was adjourned at about 4:12 P.M.)

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[3]

Detroit, Michigan

Tuesday, October 29, 1985.

About 9:25 A.M.

- - -

THE SHERIFF: All rise.

Circuit Court for the County of Wayne is now in session, the Honorable Charles Kaufman presiding.

You may be seated.

THE COURT: People versus Robert Williams, 85-567271.

You may proceed, Mr. Agacinski.

MR. AGACINSKI: Yes, Your Honor.

Ms. Williams, you have to wait outside until you testify. Your husband can stay, if he wants.

You are still under oath, Sergeant.

THE WITNESS: Yes, sir.

DAVID EARLY

called as a witness by the People, having been previously sworn by the Court, was examined and testified as follows:

REDIRECT EXAMINATION (Continued)

BY MR. AGACINSKI:

Q. Again your name for the record?

A. David Early.

Q. Sergeant Early, did you have an opportunity yesterday just before we left court to listen to the entire tape that was played for the judge?

A. Yes.

Q. Did we play the entire tape that you recorded during that first interview with Mr. Robert Williams?

A. Yes., sir.

Q. Was that tape an accurate capturing of the entire dialogue or trilogue that occurred between yourself, Robert Williams and Officer Ondejko?

A. Yes, it was.

Q. Okay.

When you testified yesterday, you mentioned that there were some details about throwing out boots, throwing out coats, throwing out guns.

TRIAL TESTIMONY: Early

Where did that dialogue occur?

A. That dialogue occurred in a subsequent interview approximately 15 to 20 minutes after the one we played yesterday.

Q. That's the allusion you made to playing from the beginning again of the tape?

A. Yes, sir.

MR. AGACINSKI: I have no further questions, Your Honor.

MR. MARCUS: I have no questions.

THE COURT: Okay. Sergeant, you may step down.

THE WITNESS: Thank you.

MICHIGAN COURT OF APPEALS OPINION

See Petition, Appendix F.

DISTRICT COURT OPINION AND ORDER

See Petition, Appendix D.

SIXTH CIRCUIT COURT OF APPEALS OPINION, ORDER, AND JUDGMENT

See Petition, Appendices A-C.

Supreme Court, U.S.
FILED
JUN 11 1992
OFFICE OF THE CLERK

(1)

No. 91-1030

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

PAMELA WITHROW,
Petitioner,

vs

ROBERT ALLEN WILLIAMS, JR.
Respondent.

ON WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
SIXTH CIRCUIT

BRIEF FOR PETITIONER

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

DO FEDERAL COURTS ON HABEAS CORPUS REVIEW OF A STATE COURT CONVICTION HAVE JURISDICTION TO FIND A PETITIONER'S STATEMENT INVOLUNTARY WHERE THE ONLY FIFTH AMENDMENT ISSUE RAISED IN THE STATE COURT, AND IN THE HABEAS PETITION, WAS WHETHER THE STATEMENT WAS ADMITTED IN VIOLATION OF THE PROPHYLACTIC MIRANDA RULES?

IF SO, WHERE THE PREMISE OF THE FIFTH AMENDMENT RULING IS A FINDING OF A MIRANDA VIOLATION, AND THE PETITIONER HAS HAD ONE FULL AND FAIR OPPORTUNITY TO RAISE THE MIRANDA CLAIM IN STATE COURT, DOES THE RULE IN STONE v POWELL, 428 US 465 (1976) BAR COLLATERAL REVIEW OF THE SAME CLAIM ON A HABEAS CORPUS PETITION?

IF NOT, IS A CONFESSION WHICH FOLLOWS MIRANDA WARNINGS INVOLUNTARY MERELY BECAUSE POLICE INDICATE THE POSSIBILITY OF LENIENT TREATMENT IF AN ACCUSED TELLS THEM THE TRUTH; AND IF SO, WOULD ADOPTION OF THE RULE ON HABEAS CORPUS VIOLATE THE PRINCIPLES OF SAWYER V SMITH, ___ US ___ ; 110 S Ct 2822 (1990) AND TEAGUE V LANE, 489 US 288 (1989)?

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OPINIONS BELOW

The Opinion of the Michigan Court of Appeals is reported at 171 Mich App 234; 429 NW2d 649 (1990), and appears in the Petition as Appendix F, pp 92a-113a; the order of the Michigan Supreme Court denying Respondent leave to appeal is reported at 432 Mich 911 (1990); the order of this Court denying a Petition for writ of certiorari is reported at 493 US 956 (1989). The order of the District Court granting the Petition for writ of habeas corpus is unreported, and appears in the Petition as Appendix D, pp 29a-86a; the opinion of the Sixth Circuit Court of Appeals affirming issuance of the writ is reported at 944 F2d 284 (1991), and appears in the Petition as Appendix A, pp 1a-25a; the order of the Sixth Circuit denying rehearing is unreported, and appears in the Petition as Appendix B, p 26a; the Judgment of the Sixth Circuit is unreported, and appears in the Petition as Appendix C, pp 27a-28a.

STATEMENT OF JURISDICTION

The District Court rendered its opinion on October 29, 1990, and entered judgment on November 1, 1990. The Sixth Circuit Court of Appeals issued its opinion on September 11, 1991, denied rehearing on October 3, 1991, and entered judgment on October 11, 1991. This Court's jurisdiction is invoked under 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of Amendments V and XIV to the United States Constitution appear in this Brief as Appendix A.

STATUTORY PROVISIONS INVOLVED

The provisions of 28 USC 2241 and 28 USC 2254 appear in this Brief as Appendix B.

STATEMENT OF THE CASE

On October 29, 1985, following a bench trial, the Michigan circuit court convicted Respondent of two counts of first-degree murder, and two counts of felony firearm. On November 6, 1985, the court sentenced Respondent to two concurrent terms of life

imprisonment for murder, and two consecutive terms of two years imprisonment for felony firearm. On December 18, 1986, following an evidentiary hearing, the trial court vacated one felony firearm count, and denied Petitioner's motion for new trial.

On September 7, 1988, the Michigan Court of Appeals affirmed Respondent's convictions in a published opinion. (Petition, 92a-107a). Respondent raised three issues in the appeal: a constitutional claim that the police had failed to give him Miranda warnings; ineffective assistance of counsel; and the adequacy of the trial court's fact findings. (6thCirJA, 66a-111a). On June 9, 1989, the Michigan Supreme Court denied Respondent leave to appeal; Respondent raised only the Miranda and ineffectiveness issues in this application. (6thCirJA, 127a-197a). On November 9, 1989, this Court denied Respondent's petition for writ of certiorari. Docket No. 89-5191, cert den 493 US 956 (1989). Petitioner had raised only the

Miranda issue in his petition. (6thCirJA, 198a-215a).

On or about December 7, 1989, Petitioner filed the instant petition for writ of habeas corpus with the District Court. Respondent claimed three grounds for issuing the writ: a violation of his Miranda rights; a claim that counsel was ineffective for failing to discuss plea bargain offers with him prior to trial; and inadequate fact findings by the trial court. (6thCirJA, 6a-12a). On October 29, 1990, the District Court issued an order, supported by a 33-page written opinion, reversing Respondent's conviction on two grounds: (1) the state trial court erred in holding that Respondent was not in police custody during his initial statement to police, and that Miranda warnings were therefore not required; and (2) his subsequent statements to police, though preceded by Miranda warnings, were coerced through promises of leniency and were therefore involuntary. (Petition, 29a-86a).

The District Judge found that the admission of these involuntary statements into evidence at trial required the reversal of Respondent's conviction. (Petition, 84a-85a). The Distict Court entertained no argument before issuing its ruling, and conducted no independent evidentiary hearing. However, the court appeared to base its conclusion on passages cited in two audiotapes, labelled "Rights in Office," (Petition, 60a-62a), and "Video," (Petition, 65a-68a). These two tapes comprised what the District Court described as the "second interrogation session," following the recitation of Miranda warnings, and formed what the District Court called the "critical question" in the case. (Petition, 63a). Although finding the evidence against Respondent "substantial," the District Court determined that the admission into evidence of the statements was not "harmless beyond a reasonable doubt." (Petition, 70a-85a).

The state court record of the proceedings discloses the following:

Defendant filed a suppression motion, claiming that the police arrested him illegally, violated his Miranda rights, and coerced him into making a statement. (JA, 4a-6a). At an evidentiary hearing into the matter, defense counsel argued that the first statement tainted all subsequent statements, and limited the evidentiary record to the tape recording of the first statement, and any relevant testimony. (JA, 19a-22a).

At the hearing, (JA, 7a-59a), the parties produced conflicting testimony on the matter of arrest, and the tenor of the interrogation. In a written opinion issued on September 27, 1985, the state trial court granted Respondent's motion to suppress his latter two statements, holding that the police did not have probable cause to arrest him following his initial statement, and that holding him in jail rendered his subsequent statements inadmissible on Fourth Amendment grounds. (Petition, 87a-91a). Concerning his first statement, and the two suppressed

statements, the trial court made the following relevant findings of fact:

> "Romulus police officers investigating two apparent murders heard that Defendant might have information about the decedents. They were admitted to Defendant's house by his mother on April 10. He was searched but not handcuffed, and asked to come to the police station for questioning. He was not placed under arrest, but agreed to come with them and to answer questions. After approximately 40 minutes of questioning at the police station, Defendant began to implicate himself. He waived his rights and the questioning continued. He was questioned a second time on April 10, after Miranda warnings and his waiver of rights. Defendant was then lodged in jail. He was given a polygraph examination and questioned a second time on April 11. He was questioned again on the morning of April 12, and was arraigned that afternoon."

At trial, defense counsel requested that the court listen to the tape of Respondent's statement at trial, and suggested playing the tape in its entirety. The single audiotape, comprising Plaintiff's Exhibit #10, consisted of Respondent's initial statement to police, on April 10th, and was the only documented statement of Respondent's admitted at trial. (JA 76a-86a). While the existing record is

unclear, this tape apparently consisted of the initial, pre-Miranda statement and a short post-Miranda interlude on April 10th; the trial court record contains no reference to the existence of a second audiotape admitted at trial. However, included in Sgt. Early's testimony was a reference to details, consisting of "throwing out boots, throwing out coats, throwing out guns," that came from "a subsequent interview approximately 15 to 20 minutes after" the one contained in Exhibit 10. (Ibid).

On appeal, the Sixth Circuit affirmed issuance of the writ. While acknowledging that the district court's opinion "inexplicably does not mention that the April 11 and 12 statements had already been excluded by the state trial court," the Circuit Court held that "our conclusion that the inculpatory statements made on April 10 should have been excluded still mandates a new trial," and approved the District Court's finding "that the admission of the April 10

statements was not harmless error." (Petition, 21a, 24a). The Circuit Court did not discuss whether the District Court's harmless error analysis was directed to statements which were not admitted into evidence at Respondent's trial.

On October 3, 1991, the Sixth Circuit denied Petitioner's motion for rehearing. (Petition, 26a). On April 20, 1992, this Court granted certiorari.

SUMMARY OF ARGUMENT

Over the last forty years, this Court has transformed the writ of habeas corpus from a powerful writ of limited application, into a general writ of federal error. The Court has done so without express authorization by Congress, by changing its construction of the applicable statutes. In doing so, the Court has countenanced a rising tide of habeas filings which afflict both the State and Federal legal systems, and inspired the

widespread relitigation of issues raised and settled on direct appeal.

In this case, the State courts -- as well as this Court -- rejected Respondent's Miranda claim on direct appeal. To permit Respondent to relitigate the matter on habeas review, is an unconscionable waste of scarce judicial resources, and ignores the powerful interests of federalism that lie at the heart of our system of government. Moreover, by abusing the habeas authority given them in this case, the lower federal courts have demonstrated that they are not immune to misadventure; that they are just as likely to blunder as State courts; and that it is folly to assume that Federal courts are inherently superior in deciding questions relating to the rights of citizens merely because they have no responsibility for local law enforcement.

To remedy this sorry state of affairs, Petitioner suggests applying the rule in Stone v Powell, 428 US 465 (1976) to the

facts of this case, barring relitigation of the issues fully and fairly litigated in Respondent's state court proceedings. The Court may do this in one of two ways: it may bar relitigation of Miranda claims on habeas review; or it may bar relitigation of all Fifth Amendment claims on habeas review. Either approach would solve the problem in the case at bar, and limiting the holding to Miranda claims would most closely tie resolution of the case to those matters actually raised below, leading to the narrower holding; however, the broader approach has the advantage of simplicity, would solve the greater number of problems, and would restore the writ of habeas corpus to its proper historical function.

ARGUMENT

I.

A STATE CRIMINAL DEFENDANT WHO HAS HAD A FULL AND FAIR OPPORTUNITY TO RAISE A FIFTH AMENDMENT CLAIM IN STATE COURT MAY NOT RELITIGATE THE MATTER ON FEDERAL HABEAS REVIEW.

> **"At the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny."**
>
> Justice Holmes, dissenting in Kepner v United States, 195 US 100, 134 (1904).

INTRODUCTION

This case presents the modern parable of habeas corpus run amok: setting aside a first-degree murder conviction, the District Court reversed a State ruling permitting the use of Respondent's confessions, finding the three confessions -- made on April 10, April 11, and April 12, 1985 -- to be involuntary, and their admission to be reversible error. Petition, Appendix, pp 84a-86a. Despite obeisance to the "presumption of correctness" owed to state court findings, ibid, at 43a, the district judge did not notice that, as the trial court had ruled the police had

no probable cause to arrest Respondent, and suppressed the statements made on April 11th and April 12th on Fourth Amendment grounds. The district judge also never acknowledged that while Respondent had claimed only that admission of the April 10th statement violated the rule in Miranda v Arizona, 384 US 436 (1966) in his state appeal and federal habeas petition, not that that his confessions were involuntary. The Sixth Circuit, noting that the District Judge had "inexplicably" overlooked the point, nevertheless took Petitioner's concession about exhaustion of the Miranda claim to cover the entire Fifth Amendment,[1] and proceeded to affirm the finding of involuntariness -- leaving counsel for

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[1] In light of this Court's holdings in Michigan v Tucker, 417 US 433 (1974) and Harris v New York, 401 US 222 (1971), it is curious that neither the District Judge, the Circuit Court, nor the Respondent (see Respondent's Brief in Opposition to Petition for Writ of Certiorari, pp 19-22) recognize the distinction between Miranda claims, and claims of involuntariness.

Petitioner the unenviable task of trying to explain the unexplainable, and looking like a fool in the process.

This Court could treat this case as a question of exhaustion, and find that the voluntariness of the confession was not properly before the habeas court.[2] Or, it could look to the lower court's reasoning,

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2 Under Picard v Connor, 404 US 270, 276-277 (1971) and Anderson v Harless, 459 US 4 (1982), a habeas court may not grant relief unless the petitioner has "fairly presented" his claim for relief to the State court.

In this case, Petitioner included a claim of involuntariness in his trial court suppression motion, but appealed his conviction on Miranda grounds -- primarily seeking to convince the state courts to adopt the more favorable "focus" test as a trigger for giving Miranda warnings, but nevertheless containing language suggesting that, even under the Federal "custody" test, he should prevail. (6thCirJA, 66a-111a, 127a-182a). As the question of involuntariness was not "fairly presented" on his State appeal, Petitioner has not exhausted his state remedies and the district court's proper order was a dismissal. Anderson v Harless, supra. And as Respondent may still raise the point under state law, see MCR 6.500 et seq, the District Court's consideration of the point was improper under 28 USC 2254(b)-(c). Moreover, as the habeas petition itself did not raise the question of voluntariness,

and reverse on the merits.[3] However,

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2 Continued
(6th CirJA, 6a-12a), the District Court had no authority to grant relief on such grounds -- and Petitioner is still awaiting an opportunity to respond to such a claim at the district court level. See also, JA, 19a-22a (Limiting state court suppression record to first tape).

This, of course, leaves aside the point that the district judge appears to have reversed a state first-degree murder conviction due to perceived coercion relating to two confessions that the state court had already suppressed on other grounds. And it would save for another day the potentially embarrassing question of whether a reviewing court should simply affirm the district court's grant of the writ under such circumstances -- or whether, as Petitioner suggested in the Sixth Circuit, the district judge's failure to perceive that she was discussing evidence which was never admitted at trial might indicate her lack of awareness of the true state of the record, and may betray a lesser degree of deference to the state findings than 28 USC 2254(d) required her to show.

3 The District Judge based her opinion on "objectively coercive police activity" (6thCirJA, 19a) consisting of police statements to Respondent that "if he was a witness, and he had no active part in the crime, and that could be confirmed by polygraph, that he would not be charged." (Ibid, 17a; see also, District Court Opinion, Petition, at 60a-71a). Leaving aside the question of deference to a state court finding -- the State courts having had no occasion to address the point, there is no such finding on which to rely -- finding such representations to be "coercion" within

focusing on such clear errors in application would ignore the question at the heart of this case.

Petitioner suggests that a proper resolution of this case requires the Court to apply the principles recognized in Stone v Powell, 428 US 465 (1976) to the case at bar. For a variety of reasons, Petitioner submits that Respondent's opportunity in the State courts for a full and fair litigation of the points he raised in the District Court should resolve the matter, rendering the District Court's ruling beyond the scope of its proper authority on collateral review.

3 Continued
the meaning of the Fifth Amendment is not consistent with any prior holdings of this Court, nor consistent with the weight of authority around the country. See, eg, United States v Mast, 735 F2d 745 (CA 2, 1984); Commonwealth v Saya, 17 Mass App 921; 456 NE2d 764 (1983); People v Pinkham, 139 Ill App 3d 554; 487 NE2d 707 (1985). Accordingly, as a new rule of law, it cannot form the basis for relief on habeas review. Teague v Lane, 489 US 288 (1989); Sawyer v Smith, ___ US ___; 110 S Ct 2822 (1990). In addition, as it suggests that persuasion is an improper interrogation tool, it appears to violate common sense. See, eg, Grano,

A.

HISTORY OF THE WRIT

1.

Origins and Development

While the precise origins of the writ of habeas corpus are largely lost to History,[4]

3 Continued
Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law, 84 Mich L Rev 662 (1986). See also, Grano, Voluntariness, Free Will and the Law of Confessions, 65 Va L Rev 859 (1979) for an interesting discussion of the concept of "voluntariness."

In any case, this also leaves aside the question of whether a district judge who reverses a state murder conviction without realizing that most of the evidence she is reviewing was never admitted at trial is really according the state court findings the proper level of deference. See supra, note 2.

4 While scholars have traced the writ's tendrils back to the century after the Norman Conquest, its earliest shaping influences are a matter of speculation. Cohen, for instance, has declined to guess whether its ultimate origins stem from William and the Normans, or from indigenous Saxon traditions. Cohen, Some Considerations on the Origins of Habeas Corpus, 16 Can B Rev 92, 115-116 (1938). Duker, on the other hand, finds an early form of the writ "firmly established by

its earliest known functions were entirely practical: the court issued an order to the local sheriff to produce one whose presence would assist the court in some pending legal matter, but who insisted upon absenting himself from the proceedings. Cohen, Some Considerations on the Origins of Habeas Corpus, 16 Can B Rev 92, 110-111 (1938). This order, known as a writ of habeas corpus,[5] was the King's command that an officer deliver a designated person into the presence of the issuing judge. By the middle of the Thirteenth Century, royal courts were often "availing themselves of this direct command to their sheriffs...to have before them a defaulting defendant, an escaping accused, or a spiteful accuser, so that justice may be

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4 Continued
1230," and finds earlier influences in the medieval courts of Eight Century England. Duker, A Constitutional History of Habeas Corpus 12-17 (1980).

5 Literally, "Thou shalt have the body."

done and the King's Peace maintained."[6] Cohen, at 111 (Citations omitted; emphasis in original). And in the next century, use of the writ would spread, as courts found itincreasingly useful as a method of "forc[ing] stubborn jurors to their duty,"[7] as well as a means of inquiring into the cause of a prisoner's detention.[8]

However, with its expanding use the writ itself became a tool of political power: if, after all, the common law courts could order

---

6 The modern scholar should not underestimate the scope of such an undertaking, for travel in medieval times was, as Cohen notes, "no small feat." These were, after all, the days of knights and wizards, when "pursuit into the next shire was high adventure." Cohen, Habeas Corpus Cum Causa -- The Emergence of the Modern Writ, 18 Can B Rev 10 (1940).

7 Cohen, at 18 Can B Rev 19.

8 As one scholar has noted, this early writ, known as "habeas corpus cum causa," marks the beginning of the modern writ, in that it was one of the earliest devices known to English jurisprudence "for subjecting incarceration to some kind of judicial scrutiny." Meador, Habeas Corpus and Magna Carta: Dualism of Power and Liberty 10 (1966). Moreover, this use marked its expansion from an ancillary writ,

the release of anyone detained, then they, in the name of the Crown, effectively commanded the obedience of any jailer and could impose their will on any other court of the realm.[9] Such a power ensured the eventual dominance of King's Bench over the other English courts; and in the 1600s, King's Bench would come to consider whether the King's judges could question a royal order of the King himself.

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8 Continued
used only in connection with some other pending legal action, to a proceeding with independent significance. See Sokol, Federal Habeas Corpus 6 (1969); Duker, at 23-33.

9 Meador has suggested that, in the conflict between the common law and chancery courts, habeas corpus became the means by which Kings Bench ultimately established its supremecy. Meador at 17. See Duker, at 33-34. See also Cohen, at 16 Can B Neo 112, 116-117.

The ancient struggle between King's Bench and Chancery may very well have a modern analogue in the modern debate over the proper scope of habeas review.

It does not take much imagination to see the "Federal Bench" following in the footsteps of King's Bench, and some day undertaking the control and supervision of our entire criminal courts system -- much as the English court came to nationalize British law a few centuries earlier.

In Darnel's Case, 3 How St Tr 1 (1627),[10] five knights of the realm had been imprisoned "by special command of His Majesty,"[11] for refusing to comply with a "forced loan" measure the King had decreed in order to meet a temporary shortage in the State treasury.[12] Filing a habeas corpus petition before King's Bench, the knights challenged the cause of their detention, claiming that the guarantees of Magna Carta guaranteed them due process of law, and a detention merely on the King's

---

10 Also known as the Five Knight's Case. See, inter alia, Meador, at 13-19; Sokol, at 9-12.

11 Ie, "per speciale mandatum Domini Regis." See Meador, at 13.

12 Similar problems remain with us to the present day. US House Appropriations Committee, The Federal Budget for 1992: Hearings before the Committee on Appropriations of the House of Representatives (1991); cf, 26 USC 7201 et seq.

In these days of rapid and unprecedented change -- from the fall of Communism, to the ominous rise of the designated hitter rule -- perhaps we may take solace in the fact that some things never change.

command violated the law of the land. But the institutional forces at work proved too powerful for the courts to ignore, and the justices were reluctant to intervene in the matter without a further grant of authority: "After all," one authority has commented, "the Justices of the King's Bench...were the King's judges, and...the writ of habeas corpus was a writ issuing in the King's name." Meador, at 17. Accordingly, the court would not look beyond the Crown's return to ask the reasons for the King's command, for upon the King's word the commitment was "presumed to be for matter of state," with no relief available from the habeas court; and if the King would not reveal the cause of confinement, the matter was effectively closed to his courts.

Perhaps uncomfortable with the implications of such a ruling, Parliament passed the Petition of Right the following year, 3 Car I, c.1 (1628), requiring that the Crown's return of the writ contain the

cause of commitment -- and that this cause be more detailed than a cryptic "by special order of His Majesty." See Meador, at 19-22. Not satisfied with the results, Parliament enacted the Habeas Corpus Act of 1641, 16 Car I, c.10 (1641), eliminating the Crown's power to arrest without probable cause, granting immediate access to the writ to all accused persons wishing a judicial determination of the legality of their detention, and abolishing Star Chamber. See, Duker, A Constitutional History of Habeas Corpus, 47-48 (1980); Sokol, at 12-13. See also, LaFave & Israel, 3 Criminal Procedure, sec 27.1, pp 286-287 (1984). And in 1679, Parliament enacted the landmark Habeas Corpus Act of 1679, 31 Car II, c2 (1679), which marks the beginning of our modern practice.[13]

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13 Sokol notes that the circumstances of the Act's actual passage may owe more to the wit of its proponents than to the merits of the Act itself: it is reputed that Lord Grey, a teller in favor of the Bill, counted

That the 1679 Act broke no legal ground is a matter of historical fact: the Act itself sought "to clarify practice and...to make the writ a more effective remedy," but it "dealt with no profound questions and introduced no legal principles." Meador, at 25-26. Still, one noted commentator concluded that it confirmed the writ as an effective tool "for the protection of the liberty of the subject, by providing...for a speedy judicial inquiry into the justice of any imprisonment on a criminal charge, and for a speedy trial of prisoners remanded to await trial." Holdsworth, 9 A History of English Law, 118 (1926). But the Act carefully circumscribed the writ's usage: it did not cover "persons

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13 Continued
one "very fat Lord for ten," intending it as a joke. But when the Opposition's teller failed to catch his jest, Lord Grey managed to hold his tongue, insuring the Bill's passage into Law. Sokol, at 14, citing Anectdotal History of the British Parliament, 40 (1881). See also, Cohen, at 18 Can B Rev 185.

convict or in execution by legal process," rendering it inapplicable to proceedings having matured into a judgment of criminal conviction. Its principle concern was pretrial detention of those awaiting trial for some criminal offense -- that is, it touched upon executive detention, or detention which was "not pursuant to judicial process." Meador, at 26-27. And the Act excluded those detained "upon a legal process, order or warrant out of some court that hath jurisdiction of criminal matters," thereby making it "unavailable for the bulk of judicial detentions." Meador, at 27. See also, Coke, 2 Institutes, 52 (1642). But where a court had exceeded its proper jurisdiction, the authorities agreed that habeas corpus was a proper remedy to seek the prisoner's release. Bushell's Case, 124 Eng Rep 1006; 6 How St Tr 999 (CP, 1670);[14] King v Hawkins, 92 Eng Rep 849 (1715);

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14 In Fay v Noia, supra at 402-405, Justice Brennan cited Bushell's Case to

Rex v Collyer, 96 Eng Rep 797 (1752); Souden's Case, 106 Eng Rep 945 (1821).

Following a half-century of rapid growth, the Act of 1679 brought a measure of stability to English law and practice, establishing habeas corpus as a legal expression of some of the noblest ideals of a People growing to meet the challenges of a New World. A century later, Blackstone would call the writ of habeas corpus "the most celebrated writ in the English law." Blackstone, 3 Commentaries on the Laws of

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14 Continued
stand for the proposition that a writ of habeas corpus was available to challenge imprisonment based upon a conviction obtained under judicial process. However, as Professor Oaks has demonstrated, Oaks, Legal History in the High Court -- Habeas Corpus, 64 Mich L Rev 451, 461-468 (1966), this stems from an inexplicable misreading of the case. Moreover, the notion that after Bushell a court could undertake to review errors of law on a writ of habeas corpus must come as quite a surprise to the British, who were under the distinct impression that their law was decidedly to the contrary. See, Ex Parte Lees, 120 Eng Rep 718, 721 (1860); Brenan's Case, 10 QB 492; 116 Eng Rep 188 (1847).

England, 129 (1768). As he wrote, a new Nation was rising on the western shores of the Atlantic, and both England and her offspring would claim the Great Writ as part of their shared legal heritage.

2.

The American Writ

Throughout Colonial times, the English settlers in the New World jealously sought the protections afforded subjects of the Crown, and several Colonies formally incorporated the writ of Habeas Corpus into their laws or charters.[15] By the time of the Constitutional Convention of 1787, usage and practice had made the writ such an organic part of the law that less than half of the new States found it necessary to include provisions for the writ as part of their own constitutions, yet nearly all subsequently adopted provisions patterned after the Federal limit on the writ's

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15 In 1692, the Massachusetts Assembly sought to adopt the Habeas Corpus Act of

suspension.[16] US Const I, 9. However, the Constitution's only mention of the writ[17] comes as a limitation on Congress' power to suspend a state's writ for prisoners in

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15 Continued
1679 as part of its formal legal structure, only to have their wishes vetoed by the British. Curiously, the British permitted South Carolina to adopt the Act in the same year -- and conferred its provisions upon Virginia a few years later by royal proclamation. The remainder of the Colonies appear to have invoked the writ as the need arose, implying that the colonial courts assumed its application even in the absence of a specific grant of authority. See Meador, at 30-31. See also, Hurd, A Treatise on the Right to Personal Liberty and on the Writ of Habeas Corpus, 111-115 (1858).

16 As Collings notes, at the time of the Constitution a "suspension" of the writ had a specific meaning under English law: it was a "legislative enactment which caused the Habeas Corpus Act to cease to operate," permitting "confinement without bail, indictment, or other judicial process." Collings, at 339-340. An example of suspension occurred during the Revolutionary War, when Parliament enacted 17 Geo III, c9 (1777), and similar statutes for the duration of the rebellion

17 US Const I, 9, cl 2 provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

federal custody. Duker, A Constitutional History of Habeas Corpus, 126-180 (1980); see also, LaFave & Israel, at 289-290. Not until the Judiciary Act of 1789[18] would federal courts have the power to issue writs on their own authority.

In 1789, Congress extended the jurisdiction of the fledgling federal courts to include the granting of "writs of habeas corpus for the purpose of an inquiry into the cause of commitment," although exempting from its reach "prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States...or are necessary to be brought into court to testify." 1 Stat 81, sec 14. Noting that Congress controls the jurisdiction of the Federal courts, this Court nevertheless examined the common law usage of the writ. for an understanding of "the meaning of the term habeas corpus." Ex Parte Bollman, 8 US (4 Cranch) 75, 93-94 (1807). And a look at

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18 1 Stat 73, 81-82 (1789).

history led this Court to recognize the limitations on the writ Congress had authorized: while recognizing its power to issue a writ to free someone held in jail, the Court found contempt convictions entered by courts of competent jurisdiction to be unreviewable on habeas corpus, Ex parte Kearney, 20 US (7 Wheat) 38 (1822); and in Ex parte Watkins, 28 US (3 Pet) 193 (1830), the Court held that a return showing a petitioner held pursuant to a criminal conviction was sufficient to justify the petition's dismissal.[19] A habeas court could not, after all, inquire into the substance of a criminal conviction, beyond satisfying itself of the entering court's

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19 In 1830, this Court had no appellate jurisdiction to review district court judgments directly. Subsequent statutes conferred upon the Court the power to grant writs of certiorari, 25 Stat 656 (1889); 26 Stat 828 (1891), and conferred appellate powers upon the circuit courts. 20 Stat 354 (1879).

While this Court may now grant certiorari to review state court judgments on federal issues of law, 28 USC 1257, nothing in the

jurisdiction.[20] For the rest, the prior court's judgment itself provided cause for the detention:

> "The writ [of habeas corpus]... brings up the body of the prisoner with the cause of commitment. The court can undoubedly inquire into the sufficiency of that cause; but if it be the judgment of a court of competent jurisdiction...is not that judgment itself sufficient cause? Can the court, upon this writ, look beyond the judgment and re-examine the charges on which it ws rendered? A judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact by deciding it....An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the Court has general jurisdiction of the

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19 Continued
law currently grants federal district courts the appellate powers to entertain direct review of state court judgments.

20 See, eg, Ex parte Milligan, 71 US (4 Wall) 2 (1866)(Holding that military courts had no jurisdiction to try civilians in areas were civil authority was functioning normally).

However, in the case of detentions pursuant to State law, federal courts had no jurisdiction to issue the writ at all. See, Ex parte Dorr, 44 US (3 How) 103 (1845).

subject, although it should be erroneous." Watkins, supra at 202-203.

Between Watkins and the Civil War, the American writ underwent minor changes in response to perceived shortcomings in the law: noting local reaction to the "Tariff of Abominations" of 1828, Congress extended the writ in 1833 to include federal agents held in state custody for acts done "in pursuance of a law of the United States." 4 Stat 634 (1833). In 1842, following a British national's state trial for murder, Congress extended the writ to include state-held foreign nationals. 5 Stat 539 (1842). See, Collings, at 351. But the first major change in the American writ would come in the aftermath of the Civil War, as an aid to Reconstruction. See generally, Mayer, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U Chi L Rev 31 (1965).

In 1867, Congress passed the Habeas Corpus Act of 1867, 14 Stat 385 (1867).

21 Attracting little notice at the time, the Congressional debates suggest that the Act's draftsman saw it as an aid to the Federal government in enforcing the "rights and liberties" of those who had been recently freed from slavery. Mayer, at 36-41. But whatever the intent of either House of Congress,[22] the Act extended the authority of federal judges to grant writs of habeas corpus "in all cases where any person may be restrained of his or herliberty in violation of the constitution, or any treaty or law of the United States." Enacted just prior to the Thirteenth, Four-

21 The Court will find a copy of the Act in Appendix C to Petitioner's Brief.

22 As Mayer notes, Sen. Trumbull, the Chairman of the Senate Judiciary Committee appears to have put a broader application on the measure than Rep. Lawrence, its sponsor. Mayer. at 40-43. In addition, it is curious that neither the Act, nor its sponsor in discussing its purpose, ever mentioned state "prisoners" at all. See Mayer, at 36-37. But given the limited application of the Bill of Rights at the time, perhaps the very notion that a state prisoner, convicted of a state criminal offense, could be held in violation of the constitution, laws, or treaties of the United States would have been dismissed as hopelessly misinformed.

teenth, and Fifteenth Amendments, the Act was among a host of Congressional enactments seeking to pull the country back together in the days following the Civil War; but the phrase "in violation of the constitution or laws or treaties of the United States" contained in our modern statute[23] is merely the 1948 recodification of the same language employed by the Reconstruction Congress -- predating ratificaton of the Fourteenth Amendment by several months, and predating the widescale application of the federal limitations contained in the Bill of Rights against the States by nearly a hundred years.

3.

The Giant's Robe[24]

The end of the Civil War ushered in an era of widespread change to the American

23 28 USC 2254(a).

24 Cf, Macbeth, V, ii, 19-22:
"Those he commands move only in command,
Nothing in love. Now does he feel his title
Hang loose about him, like a giant's robe
Upon a dwarfish thief."

Republic: freed from the bitter divisions arising from the practice of slavery,[25] and drawn by the allure -- as well as the reports of gold -- of the American Frontier, the country expanded rapidly in the late Nineteenth Century, coming to dominate the continent from coast to coast and laying the foundation for the industrial colossus that the United States would grow to become.[26] But these years of unprecedented growth and

25 Ironically, this Court's holding in Dred Scott v Sandford, 60 US (19 How) 393 (1857) -- among the earliest examples of a "noninterpretivist" mode of constitutional analysis, which invalidated the basis of the Missouri Compromise -- undoubtedly contributed to the tension in the days before the Civil War, and may well have interrupted widescale exploration of the continent until the country reached a final resolution of the slavery question.

As Professor Grano has noted, it is curious that "[t]he fact that a bloody civil war was necessary to rectify the mistake in Dred Scott" does not give the proponents of noninterpretivism more pause than it does. Grano, Judicial Review and a Written Constitution in a Democratic Society, 28 Wayne L Rev 1, 38 n 177 (1981).

26 Unfortunately, the native inhabitants of the lands explored and settled during the time took a different view of the matter. See, eg, Brown, Bury My Heart at Wounded Knee: An Indian History (1970); Beal, I

change, with the corresponding alterations in the balance of power between the states and the federal government, saw little alteration in the reach of the American writ of habeas corpus, or upon the federal judiciary's conception of its power and responsibility.

While the Act of 1867 conferred habeas authority on the federal courts to issue writs on behalf of those "restrained of... liberty in violation of the constitution," the language of the Act contained nothing implying a broadening of the writ itself. The law of habeas corpus was, after all, measured in centuries, and the historical purpose and limits of the writ were widely

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26 Continued
Will Fight No More Forever: Chief Joseph and the Nez Perce War (1963); Sandoz, Crazy Horse: The Strange Man of the Oglalas (1942).

In addition, this Court's largely noninterpretivist holding in Plessey v Ferguson, 163 US 537 (1894) would limit the application of the Grand Army of the Republic's efforts in overturning the decision in Dred Scott, leading to unfortunate, and perhaps preventable consequences in our own day.

known and well-recognized.[27] Though Congress had given the federal bench the authority to inquire into the confinement of those held in State custody, this Court showed a distinct disinclination to rewrite the statute to expand the scope of federal habeas review: while Ex parte Lange, 85 US (18 Wall) 163 (1873) extended the scope of review to include illegalities in sentencing, the Court still retained its focus on the committing court's jurisdiction, for if -- as in Lange -- a court imposes two sentences where only one is permitted, it is clearly exceeding its jurisdiction.[28] Similarly, as

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27 See, eg, Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv L Rev 441, 474-477 (1963)(Noting that, as well-understood at the time of the 1867 Act, the function of habeas corpus was to "assure the liberty of subjects against detention by the executive or military without any court process at all, not to provide postconviction remedies for prisoners").

28 See also, In re Snow, 120 US 274 (1887) and Ex parte Nielsen, 131 US 176 (1889)(Both holding that multiple indictments charging a

an unconstitutional statute confers no jurisdiction to punish, in Ex parte Siebold, 100 US 176 (1889) this Court held that a court sentencing a petitioner for violating a void statute was also acting beyond its jurisdiction. But the Court viewed this as a matter of simple common sense: since the sentencing court acquired no jurisdiction in either case, habeas relief was proper in both. This flowed logically from the rule that writs of habeas corpus offered no relief to prisoners convicted by a court of competent jurisdiction, Ex parte Parks, 93 US 18 (1876) for the rule's corollary was that jurisdictional failures rendered any ensuing detention unlawful.[29] And the

28 Continued
single offense deprives the sentencing court of jurisdiction to impose punishment for more than one offense).

Similarly, the Court found jurisdiction to impose sentence lacking in cases of an "infamous" crime, where there was no grand jury indictment to confer jurisdiction on the district court. See, eg, Ex parte Wilson, 114 US 417 (1885).

29 Interestingly, this Court would also reject the notion that a constitutional

holdings contained an important acknowledgement of the federal character of our Republic, which gave each distinct political unit of government unique powers and responsibilities, and assumed that each was capable and honest in the execution of its duties.

Therefore, the earliest cases after the Act of 1867 demonstrate the continuing nature of habeas corpus as an historically sanctioned writ, powerful in its execution but limited in its scope. This stemmed from Chief Justice Marshall's classic formulation that, even substantive errors by a court having proper jurisdiction would give no grounds for habeas relief, because

29 Continued
issue would automatically call the committing court's jurisdiction into question. See, Ex parte Bigelow, 113 US 328 (1885)(Distinguishing Lange because cumulative sentences were never actually imposed).

See Thompson, Abuses of the Writ of Habeas Corpus, 18 American L Rev 1, 16-18 (1884), for insight into the understanding of contemporary lawyers into the scope and meaning of the writ in the years following the Civil War. See also, Meador, at 61-62.

"the law trusts that court with the whole subject." Ex parte Watkins, supra at 206. And it embraced a conception of "due process," contemporaneous with the Fourteenth Amendment, which later Courts would come to forget:

> "[In] a case in which the state had jurisdiction of the offense, the general rule of the common law would intervene, and require that the prisoner should be remanded, and left to his writ of error. In such a case, although the judgment were erroneous, the imprisonment would not be in violation of the constitution or laws of the United States." Ex parte Bridges, 4 Fed Cas 98, 106 (CirCt, ND Ga, 1875)(Bradley, J, sitting as Circuit Justice).

Accordingly, this Court would come to hold that a habeas petition would not support a criminal defendant's challenge to a statute permitting a waiver of trial by jury, as such a claim did not go to the jurisdiction of the court. In re Belt, 159 US 95 (1895); see also, In re Eckart, 166 US 481 (1897)(Applying nonjurisdictional rule in Belt and Bigelow to state prisoners). And writing for a unanimous Court in 1906,

Justice Holmes would observe petitioners could not litigate claims of compulsory self-incrimination under the Fifth Amendment on habeas because, even assuming the existence of error, "it did not go to the jurisdiction of the court." Matter of Moran, 203 US 96, 105 (1906).[30]

At this juncture, a half-century after Congress enacted the 1867 Act, the Court's holding in Frank v Mangum, 237 US 309 (1915) offers a striking, and often under appreciated, development in the law: a state prisoner on Georgia's death row sought a writ of habeas corpus from the district court, claiming that a hostile public climate surrounding his trial had influenced

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30 This also appears to be the scope of the Great Writ in modern Britain. See, Wilkes, Federal and State Postconviction Remedies and Relief (1992 Ed), 41-59 (1992); Gordon, Challenging Convictions by Habeas Corpus and Certiorari, 2 Crim L Q 296 (1959). Given the availability of direct review, the English bench and bar seem to have concluded that "postconviction habeas relief is not needed," with the result that,

the jury against him, making a fair trial impossible. On direct appeal, Frank v State, 141 Ga 243; 80 SE 1016 (1914), the state supreme court considered and rejected the claim, holding the trial court maintained sufficient order and decorum during the trial to render innocuous the few minor disruptions that occurred: moreover, the affidavits of the jurors, attesting that the public cheering on the streets, audible inside the courtroom as they were polled on this verdict, did not affect them, demonstrated the lack of prejudice to the accused. The district court rejected the claim and refused to grant the writ.

On appeal, this Court recognized that "[m]ere errors in point of law, however

30 Continued
at the present time, "there is hardly any [postconviction] habeas corpus litigation in England," and "no reported English cases in the twentieth century" granting habeas corpus relief to anyone convicted of an indictable offense in a superior court. Wilkes, at 59. See also, Meador, Criminal Appeals: English Practices and American Reforms 74 (1973).

serious, committed by a criminal court in the exercise of its jurisdiction...cannot be reviewed by habeas corpus." Ibid, at 326. Still, the Court emphasized that this stemmed from considerations greater than comity: the Court would not, consistent with its responsibilities under the Fourteenth Amendment, view the jurisdictional facts as "conclusively determined against the prisoner" by the state courts, ibid, at 334, for this would reduce the guarantee of "due process" into a shadow without substance. But the Court's inquiry was, of necessity, limited by principles of federalism:

> "[T]his does not mean that [the state court] decision may be ignored or disregarded. To do this, as we have...pointed out, would be not merely to disregard comity, but to ignore the essential quesiton before us, which is...whether the state, taking into view the entire course of its procedure, has deprived him of due process of law. This familiar phrase does not mean that the operation of the state government shall be conducted without error or fault in any particular case, nor that the Federal courts may substitute their judgment for that of the state courts, or exercise any general review over their proceedings, but only that the fundamental rights of the prisoner shall not be taken from him

> arbitrarily or without the right to be heard according to the usual course of law in such cases." Ibid, at 334-335 (Emphasis added).

Turning to the particulars of the case, Justice Pitney acknowledged that "trial by mob" was an inadequate substitute for "trial by jury":

> "We...agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the state, supplying no corrective process, carries into executing a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the state deprives the accused of his life or liberty without due process of law." Ibid, at 335.

Even so, where the state provides an adequate "corrective process," likely to correct any error as it occurs, then the Federal inquiry is correspondingly larger in outlook, yet narrower in scope: due process, after all, embodies "the entire process of law," rather than isolated courtroom proceedings. Ibid, at 336. And where the State affords the

defendant a fair chance for relief, but declines to act because it finds the defendant's claims groundless, there is "no denial of due process" and no basis for habeas relief. Ibid, at 337-338. Such a limitation of the writ, the Court found, was implicit in the American system of government:

> "It follows as a logical consequence that where, as here, a criminal prosecution has proceeded through all the courts of the state, including the appellate as well as the trial court, the result of the appellate review cannot be ignored when afterwards the prisoner applies for his release on the ground of a deprivation of Federal rights sufficient to oust the state of its jurisdiction to proceed to judgment and execution against him. This is not a mere matter of comity, as seems to be supposed. The rule stands upon a much higher plane, for it arises out of the very nature and ground of the inquiry into the proceedings of the state tribunals, and touches closely upon the relations between the state and the Federal governments." Ibid, at 329.

Though rejecting the petitioner's claim for full review on the merits, the Frank Court shifted its focus in several subtle, yet significant ways: continuing to view

"jurisdiction" as the limit of its focus, the Court perceived that state court failures to protect a citizen's due process rights divest it of jurisdiction to render judgment, entitling him to relief from the Federal courts. This widened "jurisdiction" to include matters transcending the court's bare authority to entertain the subject matter, and reached into the heart of the lawsuit. Although the Court disapproved the practice of reviewing matters were fully litigated in state court, it established a potential base for the writ's later transformation into a forum for post-conviction inquiries into questions of substantive law. But the Court also acknowledged that a state's "jurisdiction," once properly invoked, embodied an entire process of law, rather than an isolated proceeding. And in directing its inquiry toward the adequacy of the state process, rather than the "correctness" of a particular outcome, the Court appeared to

recognize that perfect truth -- like perfect wisdom -- is an ideal unattainable by the limited means available to a race as imperfect as Man. See Bator, at 486-487. Given a "full and fair litigation" of a controlling point of law, Bator, at 487, the Frank Court held, a state had accorded its citizen "due process of law," and the Federal courts had no basis to intervene.

While the point is a matter of some dispute,[31] this Court confirmed the Frank rule in Moore v Dempsey, 261 US 86 (1922): Arkansas had convicted Moore and others of capital murder for killing a man during a race riot, sentencing them to death. Accepting the State's demurrer on the facts alleged, the district court dismissed the petition on grounds of insufficiency. But the Court, speaking through Justice Holmes,

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31 See, eg, Hart, Foreward, 73 Harv L Rev 84, 105 (1959); Liebman, 1 Federal Habeas Corpus Practice and Procedure, sec 2.2, pp 9-11 (1988); Peller, In Defense of Habeas Corpus Relitigation, 16 Harv Civ Rts-Civ Lib L Rev 579, 644-654 (1982).

found that the petition alleged a trial conducted amid the blood passions of a mob, that the jurors could not have voted to acquit and still continued to live in the community, and that evidence procured by the State included confessions induced by physical torture. The petition also claimed that Arkansas dismissed the claim of unfair trial on the existing record, without the advantage of an dispassionate inquiry, outside the influence of the mob, into the actual facts of the case. Justice Holmes noted the holding of Frank, that "the corrective process supplied by the state may be so adequate that interference by habeas corpus ought not to be allowed." Moore, supra at 91. But as the state had supplied no "corrective process" to afford petitioners the chance to make their case in state court, the federal courts had to inquire into the true state of facts to provide the "corrective process" needed to insure the petitioners due process of law. Cf, Mooney v

Holohan, 294 US 103 (1935); Ex parte Hawk, 321 US 114, 118 (1944).

This, then, formed the basic premise of the Court's treatment of habeas petitions until the middle of this Century: aware that some rights had a greater impact on the accuracy and legitimacy of the truth-finding process than others,[32] this Court nevertheless held to the principle that the federal courts would not relitigate a principle of law on a habeas petition. Where a State's proceedings have provided a meaningful forum for correcting any errors stemming from a criminal prosecution, the mere possibility of State error, or a difference of opinion between state and federal judges, would support no claim for relief. Cf, Ex Parte Hawk, supra; see Bator, at 493-499. Thus, in his opinion in

32 See, eg, Johnson v Zerbst, 304 US 458 (1938)(Denial of counsel); Walker v Johnston, 312 US 275 (1941) and Waley v Johnston, 316 US 101 (1942)(Coerced guilty pleas).

Schectman v Foster, 172 F2d 339, 341 (CA 2, 1949) cert den 339 US 924 (1950), Judge Hand was describing the conventional notion of habeas corpus as it existed on the eve of a major change in the American writ:

> "It must be remembered that upon habeas corpus a federal court does not in any sense review the decision in the state courts. Here, for example, the District Court could not properly have issued the writ, no matter how erroneous the judge had thought the state judge's conclusion....The writ was limited to the assertion of the relator's rights under the Fourteenth Amendment; and due process of law does not mean infallible process of law. If the state courts have honestly applied the pertinent doctrines to the best of their ability, they have accorded to an accused his constitutional rights."

Though he could not have known it at the time, Judge Hand was already writing in the past tense; for winding its way toward the Court was a case which would revolutionize federal habeas practice -- and lay the foundation for the massive importation of constitutional claims into the Federal judicial system that would flow from yet another revolution in the American judicial system.

4.

The Slippery Slope

By 1942, reports one authority, "[a]buses of habeas corpus had become so intolerable...that the Judicial Conference of the United States" did what many Governmental agencies do when confronting a problem: they "appointed a committee to investigate and report." Collings, at 355. Congress, duly noting the Committee's recommendations, embodied some of them into the 1948 revisions of the United States Code dealing with habeas petitions, providing us with the bulk of our current statute. 62 Stat 964-968 (1948). However, the "intolerable abuses" which this revision was designed to remedy appear to have been but distant echoes, when the Court came to consider the case of Brown v Allen, 344 US 443 (1953).[33]

[33] As Justice Jackson noted in his dissent to Brown, supra at 536 n 8, the "abuses" that judges of the day found intolerable stemmed from filing ranging from

In Brown, the Court once again confronted a troublesome constitutional issue in the posture of a habeas case: one petitioner, whom North Carolina had sentenced to death, claimed that his conviction violated the Constitution because the trial cuort admitted a coerced confession into evidence, and because of racial discrimination in the selection of the grand jury that indicted him, and the petit jury that convicted him; a second petitioner raised a similar claim of racial discrimination in jury selection -- a claim which had already led North Carolina to grant him two new trials. The State furnished both petitioners with admittedly "adequate" process, and the petitioners offered no quarrel with the fairness of the state forums -- only with the result. The district court

33 Continued
the 127 habeas petitions filed in 1941 to the 543 filed in 1948 -- and the 541 filed in 1952, the year before the decision in Brown.

To see the correlation between this Court's holdings and the number of habeas filings in district court, see Appendix D.

denied the writs in both cases, with one district judge taking testimony on the question of discrimination; both courts noted that this Court had denied certiorari on direct appeal, and both concluded that the petition was without merit. Subsequently, the Fourth Circuit affirmed both cases.

On certiorari, this Court affirmed -- on grounds far different than those envisioned in the lower courts, and in language which held significance that its members well may not have realized.[34]

34 At this juncture in History -- five years after the 1948 revisions, and some eighty-six years after the 1867 statute -- we must remember that we are still a decade away from the massive restructuring of the Due Process Clause and Bill of Rights that began with the holding in Mapp v Ohio, 367 US 643 (1961). And the real impact of Brown will not be felt until the holding in Fay v Noia, ten years later.

Ironically, the Court could have resolved both questions before it merely by citing Wood v Brush, 140 US 278 (1891) and Matter of Moran, supra.

Speaking for a fractured Court, Justice Reed found harmless the lower court's consideration of the earlier denial of certiorari, holding that the same result would have followed from an examination of the state court record. But eight members of the Court -- the sole exception being Justice Jackson -- wrote or signed opinions which assumed that the function of habeas corpus was to provide review on the merits of federal claims already litigated in the state court system.[35] And while the two opinions comprising the majority split on the effect of a denial of certiorari, the opinions of the Court's controlling majority spent an ironically large portion of their discussions explaining why the state's adjudication of facts should be given a great deal of

35 Professor Bator has remarked that the Court embarked on this undertaking "without any explicit discussion of the question of jurisdiction or any apparent understanding of how radical this step was...." Bator, at 500. See also, Hart, Foreward, 73 Harv L Rev 84, 106 (1959).

weight.[36] But the crux of the decision was the Court's conclusion that, while a federal district court is free to accept the state court's factfinding and conclusions, it also had the discretion to reexamine the matter:

> "...Where the record...affords an adequate opportunity to weigh the sufficiency of the alegations and the evidence, and no unusual circumstances... are presented, a repetition of the trial is not required. However, a trial may be had in the discretion of the federal court or judge hearing the new application. A way is left open to redress violations of the Constitution. Although they have the power, it is not necessary for federal courts to hold hearings on the merits, facts or law a second time when satisfied that federal constitutional rights have been protected. It is necessary to exercise jurisdiction to the extent of determining by examination of the record whether or not a hearing would serve the ends of justice." Brown v Allen, supra at 463-365.

Alone among members of the Court, Justice Jackson foresaw potential problems in "giving the convict a virtual new trial before a federal court sitting without a

36 See, eg, 344 US at 457-465, 478-487 (Reed, J); 344 US at 487-488 (Burton and Clark, JJ); 344 US at 503-510 (Frankfurter, J).

jury." Ibid, at 540. Noting that the historic purpose of the writ was to "relieve detention by executive authorities without judicial trial," he viewed the Court's expansion of the writ under the "generalities of the Fourteenth Amendment" as far exceeding the Congressional grant of authority under the Habeas Corpus Act of 1867, concluding that "if Congress intended a reversal of [the] traditional concept of habeas corpus it would have said so" in the statute.[37] Ibid, at 533-534. Pointing out the Court's increasingly blurred treatment of "due process," he observed that, for the foreseeable future, the once sturdy foundations of the Fourteenth Amendment were

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37 As noted supra, pp 35-41, the term "habeas corpus" had an historical meaning familiar to members of the legal profession in 1867. If Congress had in mind extending federal judicial authority to include post-conviction review of state court criminal convictions, it is doubtful that the term "habeas corpus" would have suggested itself for inclusion in the statute: in 1867, a "writ of error" or "writ of error coram vobis" would have been the appropriate terminology. See, eg, 14 Stat 385, sec 2.

apt to be "unknown and unknowable." He predicted that "what seems established by one decision is to be unsettled by another" and worried that the Court's construction of due process would come to "be more or less swayed by contemporary intellectual fashions and political currents." Ibid, at 534. And as he saw the the Court abandoning the traditional limits of the writ of habeas corpus, he foresaw the explosion in habeas litigation that was still, at that time, years in the offing.[38]

Justice Jackson's predictions are, in many respects, remarkable for their accuracy and precision; he appears, however, to have viewed the matter as one of simple extrapolation and common sense. But because he was trying to hold back many of the consequences that have followed from this Court's reformulation of the writ, his observations ring true even today:

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38 See infra, pp 61ff.

"It cannot be denied that the trend of our decisions is to abandon rules of pleading or procedure which would protect the writ against abuse. Once upon a time the writ could not be substituted for appeal or other reviewing process but challenged only the legal competence or jurisdiction of the committing court. We have so departed from this principle that the profession now believes that the issues we actually consider on a federal prisoner's habeas corpus are substantially the same as would be considered on appeal.

"Conflict with state courts is the inevitable result of giving the convict a virtual new trial before a federal court....That reflects a difference in outlook normally found between personel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final." Brown v Allen, surpa at 540 (Emphasis in original).

In keeping with his view of the history of the writ, Justice Jackson would have denied habeas relief to any petitioner raising a question which was -- or could have been -- raised on direct appeal, granting relief "only for those defects not disclosed on the record, going to the power,

legal competence or jurisdiction of the committing state court." Ibid, at 546-547. He thought that such rules would not "foreclose worthy causes but earmark them for the serious treatment they deserve."[39] Ibid, at 548. Moreover, the concept of ancillary jurisdiction, conferring upon a court of general jurisdiction the authority to entertain and decide all incidental issues pertaining to the cause before it, was well-recognized as a necessary means to vindicate a court's primary jurisdiction.[40] In his view, principles of federalism required this Court to acknowledge that "due process of law" did not guarantee

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39 The danger is, of course, that if a flood of petitions overloads the the system, it is as likely to obscure the truly meritorious cases as it is to breed cynicism on the part of all participants. As Justice Jackson noted in his dissent to Brown v Allen, supra at 537: "He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search." Cf, Aesop, Fables, "The Shepard's Boy," 118 (Easton Press, 1979).

40 See, eg, 20 Am Jur 2d, Courts, sec 100, p 460, and cited cases.

a particular result in any given case, that its denial meant more than a disagreement among judges, and that a mere difference of opinion between courts did not constitute an unconstitutional denial of liberty:

> "Society has no interest in maintaining an unconstitutional conviction and every interest in preserving the writ of habeas corpus to nullify them when they occur. But the Constitution does not prevent the state courts from determining the facts in criminal cases. It does not make it unconstitutional for them to have a different opinion than a federal judge about the weight to be given to evidence."

Justice Jackson was, however, only a single vote, and his view did not carry the day. After Brown v Allen, supra, Federal judges would have the authority to disregard state court findings, and reach their own conclusions on the record before them.[41] Ten years later, in the wake of this Court's

41 Subsequently, following this Court's decision in Townsend v Sain, 372 US 293 (1963), Congress would amend the statute to provide for a "presumption of correctness" of state court factfinding, unless the petitioner established one of several

coming revolution in criminal practice and procedure, this would lead to a rapid and unrestrained growth in the scope of the writ, as a new and developing method of general review.[42]

5.

The Writ of Federal Error[43]

In 1961, this Court unleashed a decade of massive and unprecented change in American

41 Continued
grounds for rebutting the presumption. 89 Stat 711 (1966).

42 In 1953, Justice Jackson perceived an "intolerable abuse" of the writ by state prisoners, stemming from the scandalous total of 541 petitions filed in the year before the decision in Brown.
Ten years later, Professor Bator noted the "strains put on the federal judicial system" by the "ever increasing flood of habeas petitions from state prisoners." Bator, at 506. The "flood" of which he was speaking totalled 906 petitions, filed in 1961 -- the last year statistice were available for his paper.
As Appendix D shows, from the perspective of 1992 a description of these numbers as a "flood" seems remotely quaint.

43 Cf, Wood v Brush, 140 US 278, 286 (1891):
> "....That [the question of racial discrimination in jury selection] was a matter arising in the course of the

criminal law. In Mapp v Ohio, 367 US 643 (1961), the Court overruled nearly a century of precedent[44] to hold that the Fourteenth Amendment's due process clause required all States to observe the same restrictions that the Founders had placed upon the Federal government, and required them to adopt the same exclusionary rule that the Court had imposed on the lower Federal courts, in order to enforce the Fourth Amendment's guarantee against unreasonable searches and seizures. In Gideon v Wainwright, 372 US 335 (1963), this Court overruled Betts v Brady,

43 Continued
proceedings against the appellant, and during his trial...which the [state] trial court was entirely competent to decide, and its determination could not be reviewed...upon a writ of habeas corpus without making that writ serve the purposes of a writ of error."

44 See, inter alia, Wolf v Colorado, 338 US 25 (1949), and cited cases.
In retrospect, it seems that what followed from this Court in the 1960s in the area of criminal law and procedure flowed from the initial premise in Mapp, that "due process" was synonomous with the Bill of Rights -- except perhaps for the Second and Seventh Amendments.

316 US 455 (1942), holding that the Fourteenth Amendment imposed upon the States the duty to ensure counsel in all felony cases, even if it meant appointing counsel for the indigent. In Malloy v Hogan, 378 US 1 (1964), this Court overruled another line of cases[45] finding that the Fourteenth Amendment required States to observe the same Fifth Amendment ban on compelled self-incrimination that the Founders had placed on the central government. And in Miranda v Arizona, 384 US 436 (1966), this Court would find in the Fifth Amendment a prophylactic "right to counsel" that earlier courts had somehow overlooked.[46]

Such cases provided new and fertile grounds for exploring the relationship between citizen and state, and are a

45 Among the cases overruled were Twinning v New Jersey, 211 US 78 (1908), and Palko v Connecticutt, 302 US 319 (1937).

46 See infra, pp 87-93, for a discussion of the relationship between Miranda and habeas review.
Ironically, though his insights were cast aside in Malloy, Justice Cardozo's opinion

continuing source of controversy. But from the perspective of habeas law, and as the source of the coming influx of state criminal cases into the federal court system, the pivotal case was not Mapp, but rather this Court's holding in Fay v Noia, 372 US 391 (1963).

In Daniels v Allen, 344 US 443 (1953), a companion case to Brown v Allen, supra, this

46 Continued
in Palko contains an interesting discussion of the difference between those attributes of a legal system necessary for "fundamental fairness," and others required of the Federal government under the Bill of Rights. Of the latter -- among which he placed trial by jury, grand jury indictments, and compulsory self-incrimination -- he observed that "[f]ew would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them, for the requirements of "due process" rest upon "a different plane of social and moral values." Palko v Connecticutt, supra at 325-326.

Three decades later, this Court would jettison the "fundamental fairness" view of due process, discovering in the Constitution a "selective incorporation" approach to due process that had been so cleverly hidden by the drafters of the Fourteenth Amendment that it had been flatly rejected by a succession of earlier courts. But see, Cooley, Constitutional Limitations 54-55 (1868) for a noted jurist's opinion on the practice of constitutional revision by judicial committee.

Court had denied relief on the grounds that the petitioner had failed to perfect his appeal, and the state court decision therefore rested upon an adequate and independent state ground. Ibid, at 486-487. In Fay v Noia, supra, this Court would confront the problem of procedural default once again, this time in the context of a confession which the State of New York conceded to be coerced. But where the Daniels Court discerned no authority to release a prisoner who had never litigated the controlling point of law on direct review, the Noia Court, speaking through Justice Brennan, looked to the "arguable illogicality of turning a rule of timing into a doctrine of forfeitures" ibid, at 426, and discerned in History a primary function for the writ in "provid[ing] a prompt and efficacious remedy for whatever society deems to be intolerable restraints."[47] Ibid at 401-402. Thus, he

47 Justice Brennan does not address the finding of an earlier historian who,

reasoned:

> "...Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release. Thus there is nothing novel in the fact that today habeas corpus in the federal courts provides a mode for the redress of denials of due process of law. Vindication of due process is precisely its historic office." Fay v Noia, supra at 402.[48]

The petitioner, convicted of murder in 1942, had never appealed his conviction, and the State of New York had denied him post-

47 Continued
surveying the history of the Great Writ, reported the "embarrassing discovery" that originally the writ of habeas corpus was used "not to get people out of prison but to put them in it." Jenks, The Story of Habeas Corpus, 18 Law Q Rev 64, 65 (1902), (emphasis in original), recounted in Scheidegger, "Rethinking Habeas Corpus," Criminal Justice Legal Foundation, August 1989 (Unpublished), p 1. But see, Duker, at 13-23.

48 The support Justice Brennan cited for this proposition was a Bill, introduced in the House of Commons in 1593, which never passed. See Professor Oaks' withering critique of the history and analysis contained in the holdings of Noia and Townsend v Sain, 372 US 293 (1963) in Oaks, Legal History in the High Court -- Habeas Corpus, 64 Mich L Rev 451 (1966).

conviction relief because of his failure to pursue a direct appeal. In fact, this was what led the district judge to deny him relief on the petition. But treating the Act of 1867 as establishing "a remedy almost in the nature of a removal from the state to the federal courts", ibid, at 416, Justice Brennan concluded that the "independence of the federal habeas proceedings from what has gone before" required that "conventional notions of finality in criminal litigation" could not "defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."[49] Ibid, at 424. Therefore, while permitting the lower courts

49 As Mayer notes, it is unlikely that the drafters of the 1867 Act, in dealing with a writ with which they were all familiar, actually intended to adopt -- sub silentio -- procedures which were, at the

to deny relief where a petitioner had "deliberately by-passed" available state court remedies,[50] the Court made the broad holding that "the jurisdiction of the federal courts on habeas corpus is not affected by the procedural defaults incurred by the applicant during the state court proceedings." Ibid, at 438. And finding no impediment to the Court's jurisdiction, and viewing the constitutional error as clearly

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49 Continued
time, "completely unprecedented in habeas cases." Mayer, at 57. And as this Court would continue to recognize the limited nature of habeas review for another eighty years or so -- and bar review, even of litigated federal claims, that did not go to the committing court's "jurisdiction" in some sense of the word -- it is difficult to follow the thread of Justice Brennan's logic.

Of course, whatever its analytical or historical shortcomings, the opinion does make for stirring rhetoric. However, as Justice Harlan once observed, it is doubtful whether this Court should make a practice of "substitut[ing] resounding phrases for analysis." Douglas v California, 372 US 353, 361 (1963)(Harlan, J, dissenting).

50 Justice Brennan did, however, admonish lower courts against lightly finding the "intentional relinquishment" of a petitioner's state court appellate rights. Fay v Noia, supra at 439, quoting Johnson v Zerbst, supra at 464.

Curiously, Justice Brennan seems to have overlooked the language in Brown v Allen, supra at 487, holding that a petitioners "failure to use a state's available remedy, in the absence of some interference or incapacity,...bars federal habeas corpus." As he cited directly to that aspect of Brown dealing with the Petitioners Daniels in Fay v Noia, at 425-426, that this escaped his attention must cause him no small distress: it was, after all, the whole reason why the Court declined to address the Daniels' petition.

established, the Court proceeded to affirm the Second Circuit's granting of the writ. Simultaneously, the holding in Townsend v Sain, 372 US 293 (1963) established the principle that a federal court must conduct its own inquiry into the underlying facts of a habeas claim if the petitioner did not receive a "full and fair hearing" in state court.

The holding in Noia began an era of explosive growth in federal habeas

litigation.[51] Fed by the burgeoning growth in matters this Court determined to constitute "constitutional" issues,[52] state habeas filings climbed tenfold in the 1960s, from 906 in 1961 -- the year of Mapp v Ohio, supra -- to more than 9,000 in 1970. Human resources being as finite as human wisdom,

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51 See Appendix D for some collected data, and infra, pp 81-87 for a discussion of related problems.

52 As Judge Friendly notes, there was a distinct difference between the conception of the Bill of Rights prevailing in the days of Brown v Allen, supra -- which intervened to protect a defendant under the concept of due process only when the State had acted in a manner "repugnant to the conscience of mankind," Palko v Connecticut, supra at 325 -- and its conception as a "detailed Code of Criminal Procedure," which converted any claimed hearsay violation, restriction on cross-examination, disagreement over the existence of probable cause for an arrest, or careless remark by a judge or prosecutor during trial into a Holy Crusade, under the banner of Due Process. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 Chi L Rev 142, 156-157 (1970). The net result is that few criminal cases will not involve a "constitutional" issue; and those that do not usually involve singularly witless defense attorneys -- whose ineptitude usually leads to a separate constitutional issue on appeal -- or genuinely repentent defendants.

however, it soon became apparent that the federal judicial system was not the limitless fount of justice that the new rules would require in order to process and decide the thousands of new yearly filings.[53] And before long, the effects of its earlier rulings would convince this Court that something had to change.

6.

The New Problems[54]

By the early 1970s, the growing

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53 Occasionally, this Court assisted in the process of self-inundation. See, eg, Jackson v Denno, 378 US 368 (1964) ovrlg Stein v New York, 346 US 156 (1953), and opening to habeas review all New York convictions in which a defendant had sought to argue to the jury, under procedures approved in Stein, that his confession was involuntary and thus unworthy of belief. Today, the Court has wisely chosen to limit habeas review to contemporaneous law, existing at the time of conviction and direct appeal. Teague v Lane, 489 US 288 (1989); Sawyer v Smith, ___ US ___ 110 S Ct 2822 (1990).

54 Cf, Gilder, Wealth and Poverty, 264 (1981): "[W]hen one produces an unduly complicated solution to a problem, one has not a solution but a new problem." See also, Publilius Syrus, Maxim 301: "There are some remedies worse than the disease."

caseload of habeas corpus petitions was putting such severe strains upon the capacity of the Federal judiciary[55] that this Court was forced to seek ways to deal with the flow of cases that Brown and Noia had made inevitable.[56] In McMann v Richardson, 397

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55 As Table D-2 shows, however, state habeas filings were not the only culprits at work.

56 Actually, commentators and authorities have noted that the "educational and deterrent functions" of criminal law require that "one violating the law will swiftly and certainly become subject to punishment...." Bator, at 452. See also, eg, President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Courts, 45-47 (1967); Burger, "Annual Report on the State of the Judiciary," 66 ABA Journal 299, March 1980; Burger, "Annual Report on the State of the Judiciary," 67 ABA Journal 291, March 1981; Schneckloth v Bustamonte, 412 US 218, 255-265 (1973)(Powell, J, concurring); Harris v Reed, 489 US 255, 282-284 (1989)(Kennedy, J, dissenting); Engle v Sims, 450 US 936, 938-939 (1981)(Rehnquist, J, dissenting from cert denial)(Noting that habeas proceedings are not an "archaelogical expedition" searching for remnants of constitutional error). As Judge Friendly notes, however, such concerns are at odds with present practice -- in which a prisoner filing a habeas petition "has not reached

US 759 (1970), the Court would withhold habeas relief from petitioners who had voluntarily pleaded guilty, even if their plea stemmed from confession they wished to challenge on habeas as involuntary. In Picard v Connor, 404 US 270 (1971), this Court would hold that a petitioner who had not "fairly presented" his federal claim to the state courts had failed to exhaust his state remedies, and could not present the claim in a habeas corpus petition under 28 USC 2254(b).[57] The Court would come to disallow

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56 Continued
the end, or even the beginning of the end, but only the end of the beginning" of his efforts to challenge his conviction. Friendly, at 142 (borrowing from Churchill, Remarks at Mansion House, November 10, 1942, following the Battle of El Alamein).

57 This Court would later refine the concept in Picard, to hold that -- however "self-evident" the ramifications of particular claim may be -- in order to "exhaust" his state court remedies on a federal claim, a habeas petitioner must advance the same claim in state court as he seeks to advance in federal court. Anderson v Harless, 459 US 4 (1982). And the Court would decline to find exhaustion in cases

petitions which contained both exhausted and unexhausted claims, Rose v Lundy, 455 US 509 (1982), or which sought retroactive application of a new rule of law. Teague v Lane, 489 US 288 (1989). And the Court would find unworkable the "deliberate by-pass" standard of Fay v Noia, supra, discarding it in favor of a "cause and prejudice" standard, which would deny relief to any petitioner whose claims the state court had rejected on grounds of procedural default -- whether the default stemmed from a failure to assert the claim itself, Wainwright v Sykes, 433 US 72 (1977); Engle v Isaac, 456 US 107 (1982), or from a failure to develop an adequate factual record, Keeney v Tamayo-Reyes, ___ US ___; 51 CrL 2069 (1992) -- unless the petitioner could establish "good cause" for the default,

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57 Continued
where a habeas petitioner first presented a new claim on discretionary review to the state's highest court. Castille v Peoples, 489 US 346 (1989).

and "actual prejudice" from the alleged constitutional error. Cf, Coleman v Thompson, 501 US ___; 115 L Ed 2d 640 (1991). However, the most promising means of bringing the habeas burden of the Federal judiciary under control stems from this Court's holding in Stone v Powell, 428 US 465 (1976) -- and many problems in the area of habeas law stem from this Court's reluctance to extend the logic and application of Stone into different areas of the law.

In Stone, petitioners had duly raised Fourth Amendment claims at their state court trials -- one claiming that as the Nevada police arrested him under an unconstitutional ordinance, the murder weapon they found on his person was unlawfully seized,[58] and

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58 This Court would subsequently hold that an otherwise lawful arrest, made pursuant to an unconsitutional statute, was a reasonable seizure under the Fourth Amendment. Michigan v DeFillippo, 443 US 31 (1979).

its admission in his California trial was therefore improper; the other claiming that evidence of his involvement in a Nebraska murder seized under a warrant was unlawfully taken from his home, due to the invalidity of the search warrant.[59] While unsuccessful in state court on direct appeal, federal courts sustained their claims on habeas, ordering new trials in both cases.[60]

On certiorari, this Court reversed. Speaking for the six-member majority, Justice Powell considered the scope and purpose of the exclusionary rule: it was not, after all, a "personal constitutional right," for it was

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59 Perhaps mindful of the incongruity posed by the notion that we could encourage police to obtain search warrants by suppressing evidence seized after they actually obtained and relied upon a warrant, eight years later this Court would conclude that evidence seized in good faith reliance upon a search warrant was a reasonable search under the Fourth Amendment. United States v Leon, 468 US 897 (1984) reh den 468 1250 (1984); Massachusetts v Shepard, 468 US 981 (1984)

60 If the lower court decisions in this case are not persuasive enough on this

never intended "to redress the injury" to the person affected. Stone v Powell, supra at 486. Rather, it was "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." Ibid, quoting United States v Calandra, 414 US 338, 348 (1974). Accordingly, given its limitations, he concluded that the negligible deterrence likely to come from enforcing the rule in a collateral habeas proceeding was too speculative to justify its application. Cf, United States v Calandra, 414 US 338 (1974); Walder v United States, 347 US 62 (1954); United States v Havens, 100 S Ct 1912 (1980). It did, after all, strain credulity to assume that police officers would refrain from conducting an unlawful search because,

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60 Continued
point, perhaps the fact that the state courts in Stone reached what this Court later determined to be the correct results -- only to be overruled on habeas by the lower Federal bench -- will give pause to those who claim that the lower Federal courts possess some special insight into federal claims.

though confident they could hide a constitutional violation from a state court, they feared that federal habeas review would reveal the true state of affairs. Thus, Justice Powell saw no reason to justify inquiring into the merits of Fourth Amendment claims on habeas review:

> "....Even if one rationally could assume that some additional incremental deterrent effect would be present in isolated cases, the resulting advance of the legitimate goal of furthering Fourth Amendment rights would be outweighed by the acknowledged cost to other values vital to a rational system of criminal justice." Stone v Powell, supra at 493-494.

Even so, the Court understood that Federal courts could still serve a valuable function in undertaking the habeas jurisdicdiction conferred by Congress. Noting that the writ of habeas corpus "will not be allowed to do service for an appeal." Stone, at 477 n 10, quoting Sunal v Large, 332 US 174, 178 (1947), the court reasoned that our notions of due process to include providing citizens with the means to challenge their detention

by the government, and that Congress had charged Federal courts with ensuring that States "provide adequate corrective process for the full and fair litigation of federal claims." Stone v Powell, supra at 476. Accordingly, while Federal courts should not relitigate Fourth Amendment claims already addressed by the State courts, this limitation presumed that states would afford defendants the chance to raise such claims directly. And so, the Court held:

> "...[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." Stone v Powell, supra at 494.

The approach Stone offers to Fourth Amendment claims displays many advantages over alternatives this Court has used in recent years: by eliminating routine de novo review, the Court conserves finite judicial resources by avoiding needless relitigation of matters already settled by the State

courts. By directing the habeas court's attention to the issue of a "full and fair hearing," the Court focuses federal attention on the true, historical attributes of "due process": a fair hearing before an unbiased tribunal, honestly applying the law of the land. Cf, Palko v Connecticut, supra at 323-328. And by acknowledging the substantial differences between a writ of error and a writ of habeas corpus, the Court has returned to its original point of departure, and seems poised to correct its mistakes of the past.

Recognizing the scope of the problem afflicting modern federal habeas review, and sensing that Stone may offer the start of a solution, some members of this Court have indicated a willingness to explore the application of Stone in other contexts. See, eg, Duckworth v Eagan, 492 US 195, 205-214 (1989)(O'Connor, J, concurring). As the instant case demonstrates what is wrong with federal habeas review today, we may now

examine the implications of such an extension, to see whether the time has come to make the move.

B.

DEFINING THE PROBLEM

From its humble beginnings as a means of compelling the attendence of recalcitrant parties, this Court has reshaped the writ of habeas corpus until it is unrecognizable. Far from the legal writ of Blackstone and Coke, the modern writ bears no resemblance to its place or function throughout History: it is now rarely used in England, since the advent of direct appeal rendered it largely obsolete, Wilkes, at 57-59, and the writ today is clearly different -- in operation, as well as scope -- than the writ Congress authorized in 1867. The Court's gradual eviseration of the jurisdictional limitation on federal habeas inquiries, Frank v Magnum, supra, rejection of limits on the power of de novo federal review, Brown v Allen, supra,

and full scale application of the Bill of Rights to the states under the rubric of "due process," see, eg, Mapp v Ohio, supra, have altered the legal landscape to make the modern writ as much a source of mischief as protection. Many routine matters of practice and procedure are now thought to be matters touching upon the "constitution or laws...of the United States," 28 USC 2254(a), and burden Federal courts with issues raised and decided in the due course of state criminal proceedings. This has converted the writ of habeas corpus into nothing more than a writ of federal error, entitling convicted state prisoners to obtain a second review of issues already litigated on direct appeal.[61]

61 Actually, this "second chance" is probably more important to a criminal defendant than many courts realize: While frivolous claims will likely be denied by any competent judge, there are many claims about which there will be honest differences of opinion. Yet if the State must succeed in multiple forums to prevail, a defendant's

However, in this new role the Great Writ has carried its historical baggage with it: the "familiar principle that res judicata is inapplicable in habeas proceedings," Fay v Noia, supra at 423 made sense in the days when the writ only examined the jurisdiction of the committing court. But extending the reach of the writ without altering its scope has transformed the writ into a juridical Frankenstein monster, which is threatening to turn upon the Society which created it.

61 Continued
chances of winning his case despite his own undisputed guilt increase markedly.

Suppose, for example, we have a challenged confession, providing the only significant evidence linking a defendant to a murder. Assuming a weak but not insubstantial claim of some violation or other -- a Miranda defect, perhaps -- a defendant may have, let us say, one chance in three of convincing a particular judge that his particular confession should be suppressed. Aside from question of credibility, the court's resolution of the matter will, of course, depend upon the judge's resolution of the matter of custody.

In the state court, the Prosecutor will have a 67% chance of prevailing. Given normal standards of review, the trial court will see its ruling affirmed on appeal. Assuming that any ensuing error-free trial results in a conviction -- no small assumption, considering the limitations on

This Court has forgotten the roots of habeas corpus, and the Writ's broad expansion in the wake of Mapp v Ohio, supra has cheapened the ancient and noble heritage that earned it an honored place in Anglo-American history.

We see that a massive duplication of effort was never part of the writ's history, or Congressional intent. This facet of the modern writ stems from the Court's abandonment of Justice Cardozo's formulation of "due process" Palko v Connecticut, supra at 325-326, in favor of a "constitutional

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61 Continued
human wisdom and the unpredictability of jurors -- the State's chances of winning an affirmed conviction are defined by the probability of winning the suppression motion.

However, if the State must relitigate the matter on habeas, that same 67% chance will be further reduced by the one chance in three that the federal judge will resolve the issues in the petitioner's favor. Therefore, the State's true chance of prevailing in both forums is 45% [ie, P(AB) = p(A)p(B), ergo P = (.67)(.67) = 0.4489]; and since the defendant need only win once, his odds of riding a longshot suppression motion to victory would make him the betting favorite in Las Vegas.

shoehorn" approach, by which the Court justifies enforcement of the Bill of Rights guarantees upon the states through the Due Process Clause of the Fourteenth Amendment. But the Court has never questioned its exportation of "due process" from its function as a tool of incorporation into other areas of the law, nor questioned the effect of modern "due process" on statutory language which predated the holding in Mapp v Ohio, supra: the Court has never, for example, questioned whether Congress, at the time of the 1867 Habeas Act, really intended such a wide scope for habeas review -- or if its inability to forsee the holding in Mapp, and the many other means available at the time for creating a federal writ of error,[62] might not indicate a flaw in the

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62 See, eg, The Federalist, No. 81. In any case, Congress saw fit to vest this Court with the jurisdiction to review state tribunals on writ of certiorari, thereby settling the point. 28 USC 1257. See also, 14 Stat 385, sec 2.

Court's reasoning.[63] And lost somewhere in the mountains of annual habeas filings is any concern about Justice, about a petitioner's actual guilt or innocence, or about the proper allocation of judicial responsibilities between the States and the Federal government.

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63 Actually, at least one attorney has wondered whether we might not trace much of the volatility in modern law to the replacement of traditional modes of construction -- eg, construing the Constitution by actually reading the document -- with the modern method: construing the cases which construe the Constitution, then construing those cases which construe the cases which construe the Constitution, and so on ad infinitum. Cf, Minnick v Mississippi, 498 US ___; 111 S Ct 486 (1990)(Scalia, J, dissenting)(Noting the "vertitable fairyland castle of imagined constitutional restrictions" stemming from the practice of building prophylaxis upon prophylaxis).

For those constantly seeking New Horizons in Constitutional Adjudication, the modern approach has the advantage of raising an infinite number of new questions with each case decided. But it reminds counsel of the fabled story whispered from ear to ear around a table: by the time it makes it all the way around, it usually bears little resemblance to the original message; and what starts out as a simple statement ("I don't like beets") is apt to return as

Stating a problem, however, is easier than solving it. And unless we wish to repeat the mistakes of the past four decades, we should not undertake any major steps without first assuring ourselves that our efforts will not simply make matters worse.

C.

A TALE OF TWO PARADIGMS

Applying the lessons of Stone v Powell, supra to the facts of this case will take us to a fork in the legal road: as Respondent raised only a Miranda claim in his state appeal and the instant Petition,[64] this Court need only address the application of

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63 Continued
something completely different ("That idiot Caminsky beat up his spinster Aunt Matilda for eloping with an Australian sheep rancher").

We can see how this approach has altered our conception of habeas corpus; we can only imagine what another generation or two of "round the table" construction will do to the actual Constitution.

64 Miranda v Arizona, 384 US 436 (1966). See, eg, Defendant-Appellant's Brief on Appeal and Defendant-Appellant's Application

Stone to claims of Miranda-defective confessions to decide the case. On the other hand, as the District Court based its decision on the purported involuntariness of Respondent's statement, (Petition, 84a-85a), and the Sixth Circuit also proceeded to consider the voluntariness of the statement, (Petition, 13a n 1, 16a-24a), this Court may wish to consider applying Stone to the full range of Fifth Amendment claims.

While the concerns of Stone resonate across the full scope of habeas review, however, applying its lessons in differing contexts may require a difference in approach: the prophylactic concerns of Miranda are, after all, different than those at the heart of the Fifth Amendment. And although extending Stone to Miranda is an excercise in elemental logic, applying Stone across the full breadth of the Fifth

64 Continued
for Leave to Appeal, 6thCirJA, 66a-111a, 127a-182a.
See also the Petition for Writ of Habeas Corpus, in this matter, Ibid, 6a-12a.

Amendment would require a fundamental change in outlook, altering the range of concerns relevant to a habeas petition.

Therefore, let us examine each possibility in turn, to see whether either approach warrants this Court's adoption.

1.

WHEN A HABEAS PETITIONER HAS HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE A MIRANDA CLAIM IN STATE COURT, THE RULE IN STONE v POWELL BARS RELITIGATING THE POINT IN A FEDERAL HABEAS PROCEEDING.

In Stone v Powell, supra, the Court noted that the exclusionary rule was not a "personal constitutional right," but was a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect...." Ibid, at 486, citing United States v Calandra, 414 US 338, 348 (1974); see also, Linkletter v Walker, 381 US 618 (1965). Thus, as a prophylactic rule, the exclusionary remedy carries costs that often exceed the

legitimate Fourth Amendment interests at stake. Stone v Powell, at 490-491; see also, 428 US 496-502 (Burger, CJ, concurring), Schneckloth v Bustamonte, supra at 266-274 (Powell, J, concurring). Given the compelling state interest in detecting and punishing crime, cf, Alderman v United States, 394 US 165, 174-175 (1969), the Court noted the "costs of applying the exclusionary rule," Stone v Powell, supra at 489, and sought to apply it only in "those areas where its remedial objects are thought most efficaciously served." Ibid, at 486-487, quoting Calandra, at 348. Therefore, given the speculative nature of any deterrence flowing from an exclusionary rule applied on collateral attack, and the undeniably reliable evidence that would be kept from the fact-finder on retrial, the Court concluded that fully-litigated Fourth Amendment claims could not support a claim for relief on habeas review. Stone v Powell, at 492-496.

Applying this analysis to Miranda claims, the result should be the same: like the Fourth Amendment's exclusionary rule, Miranda is a prophylactic rule that over-protects the Fifth Amendment interests it is designed to serve. Michigan v Tucker, 417 US 433 (1974), Oregon v Elstad, 470 US 298, 306-310 (1985); cf, Harris v New York, 401 US 222 (1971). See also, Duckworth v Eagan, 492 US 195, 208-210(1989) (O'Connor, J, concurring). Moreover, like evidence seized in violation of the Fourth Amendment, voluntary confessions are reliable evidence of a defendant's guilt, which "significantly contribute to the certitude with which we may believe the accused is guilty." Miranda v Arizona, supra at 538 (White, J, dissenting). It follows that, as the concerns underlying Fourth Amendment claims on habeas are identical to those involving Miranda defects, a habeas court's treatment of the two claims should be the same: and as fully-litigated Fourth Amendment claims

provide no basis for relief on habeas, a fully-litigated Miranda claim should provide none, either.

Even so, there is a more basic reason why Miranda claims give a habeas court no basis for granting relief: such relief is simply beyond the jurisdiction of the Federal court. The Habeas Act provides, after all, that applications for relief are proper only "on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 USC 2254(a). But this Court has recognized that the Miranda rules "were not themselves rights protected by the Constitution but were instead measures to insure that the [constitutional] right against compulsory self-incrimination was protected," Michigan v Tucker, supra at 444; Miranda v Arizona, supra at 467. It follows, that a habeas petition alleging a Miranda defect does not claim that the petitioner's imprisonment is "in violation of the Constitution...of the

United States." And as Congress has passed no law -- nor ratified any treaty -- adopting the Miranda rules as a matter of national policy, Miranda claims are simply not covered by the habeas statute,[65] and under 28 USC 2254(a) a federal court has no jurisdiction to grant a state prisoner any relief on this basis.

Applying the rule to this case, we see that the only federal issue properly before the district court concerned Respondent's claim that the police violated his rights under Miranda; accordingly, he has stated no grounds for relief, and the district judge should have dismissed the petition.

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65 This also suggests that the Court exceeded its constitutional authority under Article III of the Constitution in the Miranda case. For a critical examination into the questionable constitutional underpinnings of the Miranda holding, see, Grano, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 NW U L Rev 100 (1985), and Caminsky, A Challenge to Miranda, 14 Search & Seizure L Rept 145 (1987).

2.

WHEN A HABEAS PETITIONER HAS HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE A FIFTH AMENDMENT CLAIM IN STATE COURT, THE RULE IN STONE v POWELL BARS RELITIGATING THE POINT IN A FEDERAL HABEAS PROCEEDING.

We have seen that many of the problems with federal habeas review stem from the problem of relitigation. Once properly preserved, under Brown v Allen, supra a federal court is free to undertake a review on the merits, subject only to a "presumption of correctness" owed the state court's factual findings.[66] 28 USC 2254(d). Sumner v Mata, 455 US 591 (1982). And given the multiplicity of rights this Court has constitutionalized in the wake of Mapp v Ohio,

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66 Actually, the district court ruling in this case demonstrates exactly how meaningless such a presumption can be: the district judge did not cite the state court's opinion -- and, by proceeding to hold involuntary statements that the state judge had suppressed on grounds that the police lacked probable cause to arrest him, see Petition, pp 90a-91a, demonstrated a singular lack of awareness concerning the findings that she was presuming correct.

supra, a defendant's ability to relitigate any federal issue arising in the course of his prosecution places most routine points of criminal procedure within the ultimate scope of Federal review.

However, while Stone v Powell, stems from the post-Mapp era, its language recalls earlier holdings of this Court, concerning the proper scope of habeas review. It is, upon reflection, the modern analogue of cases such as Mangum, Moore, and Ex parte Hawk, all of which recognized that an adequate "corrective process" was all that the "due process" under the "Constitution or laws of the United States" required, and that the federal courts on habeas corpus had no authority to relitigate most points decided in a state court -- even points decided incorrectly -- so long as the State afforded its defendant a full and fair hearing of the matter.

Viewed from the perspective of History, Brown v Allen, supra clearly overstates both the Federal interest, and the federal rights at stake in a habeas corpus proceeding. There is, after all, no Federal interest in relitigation; neither is there a Federal interest in extending the length of state criminal proceedings, or in burdening the Federal judiciary with routine oversight of state court criminal prosecutions. On the other hand, each citizen has an interest in due process -- in the fairness of our courts, and in the undisturbed enjoyment of our rights as citizens unless and until the State can establish guilt of some criminal offense.

But this basic interest in fair procedures is not the same as the "due process" concerns that prompted this Court to recast the Bill of Rights as "a detailed Code of Criminal Procedure," Friendly, at 156: those concerns were, for the most part, substantive in nature, concerned with the content of the

right, not its application. Thus, even as we may debate the wisdom of various readings of the substantive content of the Constitution, the true Federal interest in "due process of law" is the same today as it has always been: ensuring a fair hearing, before a competent and unbiased tribunal applying the law of the land. While this Court has recast the content of many of our rights, the habeas statute has never required the Court to give a litigant multiple forums for contesting a point of law: habeas corpus is, after all, a writ of limited application, not a writ of error. Wood v Brush, supra; Frank v Mangum, supra; Moore v Dempsey, supra. Therefore, applying the rule in Stone v Powell, supra to all claimed violations of the Fifth Amendment[67] would merely return habeas corpus to its in-

[67] As noted above, there is a legitimate basis for distinguishing between Miranda claims, and violations of the Fifth Amendment: Miranda claims stem from alleged violations of a prophylactic rule, not from violations of the Constitution. Accordingly, if this Court extends the rule

tended and historic function in our federal system; it would, however, require this Court to overrule the holding in Brown v Allen, supra, restoring the formulation the Court last expressed in Ex parte Hawk, supra, at 118, nine years earlier:

> "Where the state courts have considered and adjudicated the merits of his contentions, and this Court has either reviewed or delined to review the state court's decision, a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated. But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy, or because in the particular case the remedy...proves in practice unavailable or seriously inadequate, a federal court should entertain his petition for habeas corpus, else he would be remediless." (Citations omitted).

Returning to such a rule would require this Court to rearticulate the basic goals and limitations of habeas review; more im-

67 Continued
in Stone to include all Fifth Amendment claims, it could do so only by extending it to include all claimed violations of the Constitution.

portantly, it would alter present practice in many meaningful ways. As these changes would be entirely consistent with the language and purpose of the Statute, they need no further authorization by Congress; and as they would be entirely beneficial to the system of habeas review, they should present no impediment to this Court's adoption, if convinced that such changes are within this Court's constitutional prerogatives.[68] In any case, the resulting system of habeas review should operate in the following manner:

(1) The proper subjects for challenge on federal habeas review are whether a pet-

68 As Colling, at 355, and others have noted, see, eg, LaFave & Israel, at 292-297, the statute itself has remained largely unchanged since 1867: the only changes have sought to limit this Court's power, by codifying rules relating to exhaustion, factfinding, and the admission into evidence of certified copies of prior state court findings and opinions.This Court itself is the source of any expansion of the scope of habeas review that has taken place, and any of the ensuing problems; accordingly, this Court may properly look to itself to correct any mistakes it has made in the past.

titioner received due process of law -- or, in other words, whether he had a full and fair hearing on a contested federal claim, before a competent tribunal charged with applying the law of the land. The proper scope of federal inquiry is the fundamental fairness of the proceedings, and the jurisdiction of the committing court; any other issue settled on direct review is the "law of the case," and affords, rather than denies, due process of law.

(2) Absent a showing of "cause and prejudice", a petitioner who has failed to raise a federal claim in his state court proceeding has shown no denial of a "full and fair opportunity" to litigate the point on direct review, and has failed to exhaust his state remedies. Accordingly, habeas review would be unavailable. 28 USC 2254(b); Wainwright v Sykes, supra; Keenan v Tamayo-Reyes, supra.

(3) A petitioner who has properly raised and fully litigated a substantive federal

claim in his state court proceeding has had a "full and fair hearing" on the issue, and may not relitigate the point on federal habeas review. 28 USC 2254(d); Stone v Powell, supra; Ex parte Hawk, supra.

(4) A habeas petitioner showing the denial of a "full and fair" opportunity to litigate a relevant point of federal constitutional law will invoke the jurisdiction of the habeas court; a showing of "cause and prejudice" for failing to raise an apparently meritorious federal claim will suffice to demonstrate the denial of a "full and fair opportunity" to litigate the point in the state court proceeding. Likewise, a showing of the committing court's lack of jurisdiction -- either over the person or the subject matter -- will invoke the jurisdiction of the habeas court.

(5) A habeas petitioner demonstrating that the committing court lacked jurisdiction will be entitled to his immediate discharge from state custody.

(6) A habeas petitioner demonstrating a denial of a "full and fair opportunity" for litigation of an apparently meritorious federal claim is also entitled to relief; however, the habeas court should have the discretion needed to grant relief reasonably appropriate to remedy the harm suffered.

(7) To conserve the resources of the federal judiciary, and further the interests of federalism and comity, a habeas court concluding that a State denied the petitioner a "full and fair opportunity" to raise an apparently meritorious federal claim should remedy the harm suffered by the means least intrusive upon legitmate State interests, and most likely to vindicate the petitioner's own legitimate interests. Ordinarily, this will entail an order noting the denial of a fair hearing, directing the State courts to grant such a hearing, and issuing a writ conditionally granting a new trial in the event that the State does not afford such a hear-

ing. 28 USC 2243 (Authorizing the court to "hear and determine the facts, and dispose of the matter as law and justice require").

(8) In the rare case leading a habeas court to conclude that the State is unable or unwilling to provide a petitioner with due process of law, the court may conduct a full hearing on the merits of the petitioner's claim, and issue the appropriate order. Ibid; 28 USC 2254(d)-(e).

Structuring habeas review in this manner would return the Federal judiciary to the scope and practice of habeas review as it existed at the time of the 1948 revisions of the original 1867 statute. It would be simpler, and easier to administer than the unwieldy, unauthorized "writ of federal error" that we presently call habeas corpus, and channel judicial resources in more productive ways. Most of all, however, this mode of habeas review recognizes what earlier

courts realized, and later Courts seem to have forgotten: the best designed systems are largely self-correcting; a reversal of any court's judgment shows not that the system is working, but that it is malfunctioning in some way; and when the judicial system is performing properly, habeas relief will never be necessary.

If we apply these rules to the instant case, it is clear that Respondent has stated no grounds for relief: to the extent that he properly presented his Miranda claim to the State courts, he has already fully litigated the matter, making resolution of the issue the law of the case, and beyond the proper scope of habeas review; to the extent that the district court considered matters outside those issues duly raised on direct appeal, Respondent not exhausted his state remedies, requiring the dismissal of his petition. In either case, Petitioner has not shown that the State denied him a "full and fair opportunity" to litigate the point in

State court, rendering his habeas claim meritless.

D.

CONCLUSION

> **"Although, if past experience is any guide, I am sure I will be accused of proposing to abolish habeas corpus, my aim is rather to restore the Great Writ to its deservedly high estate and rescue it from the disrepute invited by its current excesses."**
>
> Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, U Chi L Rev 143, 144 (1970).

As a symbol of Liberty and a tool of Freedom, the writ of habeas corpus richly deserves its honored place in our legal heritage. A bulwark against arbitrary detention, its service as a Guarantor of due process is measured in centuries. And if we look at our legal system from the perspective of History, we see evidence of the Great Writ at every turn:

The battles between Parliament and the Crown, and between the Crown and the Colonists, showed our Founders the danger of

concentrated and despotic power. Darnel's Case demonstrated that judges who could not question the word of the Executive could not protect the powerless from tyranny. This aspect of the Writ is now found in our constitutional doctrine of the separation of powers, and in the Fourth Amendment's guarantee against unreasonable searches and seizures.

The Writ brought the prisoner into court, subjecting him to the protection -- and the power -- of the magistrate. Today, we call this "due process of law," and hear its echoes in the bail provisons of the Eighth Amendment.

In early England, the Writ was often the only means by which subjects could bring their case to a judge, and have any charges against them resolved quickly, and according to the law. This facet of the Writ now has its home in the Speedy Trial Clause of the Sixth Amendment.

Though the Writ has all but disappeared in modern England, we see vestiges in the English and American institutions of appellate review, and our conceptions of "inferior" and "superior" tribunals. And if we were to erase the term from our collective memories, we could not dim its influence on our ideas of fairness, or mercy, or justice.

We should not be afraid of looking to the past, as well as the future -- or consulting our History, as well as our ideals. If we mean to preserve the writ of habeas corpus as a living part of our jurisprudence, we cannot mistake it for a Holy Relic -- nor transform it by magic into something it is not. And if we mislead ourselves into thinking that the Writ is a gift from God, bestowing grace on all who invoke its name, we only sully its legacy with misuse, and invite the contempt of those who would abuse it.

That the modern writ bears no resemblance to the Great Writ of history is an unfortunate, but undeniable fact of our

current legal system. Its replacement with the modern "writ of federal error" has transformed it from a lasting bulwark against oppression into a forum for perpetual appeal, cheapening its legacy even as it renders it ever less likely that its protection will be there for those who really need it. But as it was this Court which first undertook the departure, returning the writ to its proper place is within this Court's power, and restoring the writ to beneficial use on behalf of all Americans would be an honorable legacy for this Court to leave to future generations. In the final analysis, the writ of habeas corpus, like the Constitution itself, does not belong only to criminals; it belongs to all of us.

II.

AN ISSUE IS NOT "FULLY AND FAIRLY" PRESENTED FOR STATE COURT REVIEW WHEN THE DECISIVE ASPECT OF THE ISSUE IS RAISED NEITHER IN STATE COURT NOR IN A PETITION FOR COLLATERAL RELIEF, BUT FIRST APPEARS IN THE DISTRICT COURT'S OPINION GRANTING FEDERAL HABEAS RELIEF.

See supra, note 2.

III.

A CONFESSION IS NOT INVOLUNTARY MERELY BECAUSE INDUCED BY THE POSSIBILITY OF FUTURE LENIENCY; AND RELIEF ON SUCH GROUNDS IS PRECLUDED ON COLLATERAL REVIEW UNDER TEAGUE v LANE, 489 US 288 (1989) and SAWYER v SMITH, ___ US ___; 110 S Ct 2822 (1990).

See supra, note 3.

RELIEF

WHEREFORE, Petitioner prays that this Court reverse the holding of the Sixth Circuit Court of Appeals, and reinstate Respondent's state court conviction for first-degree murder.

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Dated: June 4, 1992

JC/eb

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APPENDIX A

Text of Relevant Constitutional Provisions

1.

Constitution of the United States, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in the actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2.

Constitution of the United States, Amendment XIV, section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

Text of Relevant Statutory Provisions

28 USC 2241 et seq

2241. POWER TO GRANT WRIT

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to

the district court having jurisdiction to entertain it.

(c) The Writ of habeas corpus shall not extend to a prisoner unless -

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption

claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him to court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of

justice may transfer the application to the other district court for hearing and determination.

(June 25, 1948, ch 646, 62 Stat. 964; May 24, 1949, ch. 139, § 112, 63 Stat. 105; Sept. 19, 1966, Pub. L. 89-590, 80 Stat. 811)

2242. APPLICATION

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit court judge it

shall state the reasons for not making application to the district court of the district in which the applicant is held.
(June 25, 1948, ch. 646, 62 Stat. 965).

2243. ISSUANCE OF WRIT; RETURN; HEARING; DECISION

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless is appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause

additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.
(June 25, 1948, ch. 646 62 Stat. 965).

2244. FINALITY OF DETERMINATION

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

(b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instances of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a

Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appeal in such record by the exercise of reasonable diligence.

(June 25, 1948, ch. 646, 62 Stat. 965; Nov. 2, 1966, Pub. L. 89-711, § 1, 80 Stat. 1104.)

2245. CERTIFICATE OF TRIAL JUDGE ADMISSIBLE IN EVIDENCE

On the hearing of an application for a write of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who preside at the trial resulting in the judgment, setting forth the facts

occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

(June 25, 1948, ch. 646, 62 Stat. 966).

2246. EVIDENCE; DEPOSITIONS; AFFIDAVITS

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

(June 25, 1948, ch. 646, 62 State. 966).

2247. DOCUMENTARY EVIDENCE

On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

(June 25, 1948, ch. 646, 62 Stat. 966).

2248. RETURN OR ANSWER; CONCLUSIVENESS

The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceedings, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.

(June 25, 1948, ch. 646, 62 Stat. 966).

2249. CERTIFIED COPIES OF INDICTMENT, PLEA AND JUDGMENT; DUTY OF RESPONDENT

On application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them as may be material to the questions raised, if the petitioner fails to the answer to the order to show cause.

(June 25, 1948, ch. 646, 62 Stat. 966).

2250. INDIGENT PETITIONER ENTITLED TO DOCUMENTS WITHOUT COST

If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of

any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his officer as may be required by order of the judge before whom the application is pending.

(June 25, 1948, ch. 646, 62 Stat. 966).

2251. STAY OF STATE COURT PROCEEDINGS

A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any State court or by or

under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

(June 25, 1948, ch. 646, 62 Stat. 966).

2252. NOTICE

Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such States as the justice or judge at the time of issuing the write shall direct.

(June 25, 1948, ch. 646, 62 Stat. 967.)

2253. APPEAL

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

There shall be no right of appeal from such an order in a proceeding to test the person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

(June 25, 1948, ch 646, 62 Stat. 967; May 24, 1949, ch. 139 § 113, 63 Stat. 105; Oct. 31, 1951, ch. 655, § 52, 65 St. 727).

2254. STATE CUSTODY; REMEDIES IN FEDERAL COURTS

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the united States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction if the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceedings in the Federal court, when due proof of such factual determination has been been, unless the existence of one or more the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent,

or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall

determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the Stated court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(June 25, 1948, ch. 646, 62 Stat. 967; Nov. 2, 1966, Pub. L. 89-711, § 2, 80 Stat. 1105).

2255. FEDERAL CUSTODY; REMEDIES ON MOTION ATTACKING SENTENCE

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the sentence was in excess of the maximum authorized by law, or

is otherwise subject to collateral attack, may move the court which imposed thee sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(June 25, 1948, ch. 646, 62 Stat. 967; May 24, 1949, ch 139, § 114, 63 Stat. 105)

APPENDIX C

Historical Materials

1.

From Coke, Second Part of the Institutes of the Laws of England 51-54 (1642):

* * *

Now here it is to be knowne, in what cases a man by the law of the land, may be taken, arrested, attached or imprisoned in case of treason or felony, before presentment, indictment, &c. Wherein it is to be understood, that processe of law is two fold, viz. By the kings writ, or by due proceeding, and warrant, either in deed, or in law without writ.

As first, where there is any witnesse against the offendor, he may be taken and arrested by lawful warrant, and committed to prison.

When treason and felony is committed, and the common fame and voice is, that A. is guilty, it is lawfull for any man, that suspects him, to apprehend him.

This fame Bracton describeth well, **fame quae suspicionnem inducit, oriri debet apud bonos, et graves, non quidem malevolos, et maledicos, sed providas et fide dignas personas, non semet,sed saepius, quia clamor minmit, et defamatio manifestat.**

So it is of hue and cry, and that is by the statute of Winchester, which is but an affirmance of the common law: likewise if A. be suspected, and he fleeth, or hideth himselfe, it is a good cause to arrest him.

If treason or felony be done, and one hath just cause of suspition, this is a good cause, and warrant in law, for him to arrest any man, but he must shew in certainty the cause of his suspition: and whether the suspition be just, or lawfull, shall be

determined by the justices in an action of false imprisonment brought by the party grieved, or upon a habeas corpus, &c.

A felony is done, and one is pursued upon hue and cry, that is not of ill fame, suspicious, unknown, nor indicted; he may be by a warrant in law, attached and imprisoned by the law of the land.

A watchman may arrest a night walker by a warrant in law.

If a man woundeth another dangerously, any man may arrest him by a warrant in law, until it may be known, whether the party wounded shall die thereof, or no.

If a man keep the company of a notorious thiefe, whereby he is suspected, &c. it is a good cause, and a warrant in law to arrest him.

If an affray be made to the breach of the kings peace, any man may by a warrant in law restrain any of the offenders, to the end the kings peace may be kept, but after the affray ended, they cannot be arrested without an expresse warrant.

See now the statutes of 1 & 2 Phil. & Mar. cap. 13. & 2 & 3 Phil. & Mar. cap. to.

Now seeing that no man can be taken, arrested, attached, or imprisoned but by due processe of law, and according to the law of the land, these conclusions hereupon doe follow.

First, that a commitment by lawfull warrant, either in deed or in law, is accounted in law due processe or proceeding of law, and by the law of the land, as well as by processe by force of the kings writ.

2. That he or they, which doe commit them, have lawfull authority.

3. That his warrant, or mittimus be lawfull, and that must be in writing under his hand and seale.

4. The cause must be contained in the warrant, as for treason, felony, &c. or for suspition of treason or felony, &c. otherwise if the mittimus contain no cause at all, if the prisoner escape, it is no offense at all, whereas if the mittimus contained the cause, the escape were treason, or felony, though he were not guilty of the offence; and therefore for the kings benefit, and that the prisoner may be the more safely kept, the mittimus ought to contain the cause.

5. The warrant or mittimus containing a lawfull cause, ought to have a lawfull conclusion, viz. and him safely to keep,

untill he be delivered by law, &c. and not untill the party committing doth further order. And this doth evidently appeare by the writs of habeas corpus, both in the kings bench, and common pleas, eschequer and chancery.

Rex vicecom. London. Saolutem. Praecipimus vobis, quod corpus A.B. in custodia vestra detent.ut dicitur, una cum causa detentionis fuce, quocunq; nomine praed. A.B. cenfeatur in eifdem, habeatis coram nobis apud Wesim. die 'Joviis prox' poft octabis S. Martini, ad fubjiciend. et recipiend. ea, quce curia nofta de eo adtunc, et ibidem orrdinari. contigerit in bac parie, et bac hoc nullatenus omittatis, periculo incumbente, et habeatis ibi hoc breve, teste Edrv. Coke 20 Nov. anno regni nostri 10.

This is the usuall forme of the writ of habeas corpus in the kings bench, vide Mich.

5 E. 4 Rot. 143. coram Rege, Kefars case, under the teste of Sir. John Markham.

Rex vicecom. London. Salutem. Praecipimus vobis, quod habeatis coram justiciariis nostris, apud Wesim. die 'Jovis prox' post quinque septiman. Pafche, corpus A. B. quocunque nomine censcatur, in prisona vestra, fub custodia vestra detent.ut dicitur, una cum die, et causa captionis et detentionis ejusalem, ut iidem justiciar. nostri, visa causa illa, ulterius fieri fac', quad de jure, et jecundum legen, et consuetudinem regni nostri Angliac for et saciend. et habeatis ibi hoc breve, teste, &c.

The like writ is to be graunted out of the chancery, either in the time of the erme (as in the kings bench) or in the vacation; for the court of chancery is officina justitiae, and is ever open, and never adjourned, so as the subject being

wrongfully imprisoned, may have justice for the liberty of his person as well in the vacation time, as in the terme.

By these writs it manifestly appeareth, that no man ought to be imprisoned, but for some certain cause: and these words ad **subjiciend. et recipiend. &c.** prove that cause must be shewed: for otherwise how can the court take order therein according to law?

And this doth agree with that which is said in the holy history, **Sine ratione mibi videtur, mittere vinctum in carcerem, et causas ejus non significare.** But since we wrote these things, and passed over to many other acts of parliament; see now the petition of right; **anno tertio Caroli regis,** resolved in full parliament by the king, the lords spirituall, and temporall, and the commons, which hath made an end of this question, if any were.

Imprisonment doth not onely extend to false imprisonment, and unjust, but for detaining of the prisoner longer then he ought, where he was at the first lawfully imprisoned.

If the kings writ come to the sheriffe, to deliver the prisoner, if he detain him, this detaining is an imprisonment against the law of the land: if a man be in prison, a warrant cannot be made to the gaoler to deliver the prisoner to the custody of any person unknown to the gaoler, for two causes; first, for that thereby the kings writ of habeas corpus, or delivery, might be prevented. 2. The mittimus ought to bee, as hath beene said, till hee bee delivered by law.

If the sheriffe, or gaoler detain a prisoner in the gaole after his acquitall, unless it be for his fees, this is false imprisonment.

In many cases a man may be by the law of the land taken, and imprisoned, by force of the kings writ upon a suggestion made.

Against those that attempt to subvert, and enervate the kings **ad capiendum impagnatores juris regis, et ad ducendum ecs ad gaolam de Newgate**; which you may reade in the Register at large. **Ubi supra.** And this is **lex terrae**, by processe of law, to take a man without answer, of summons in this case: and the reason is, **merito beneficium legis amittit, qui legem ipsam subvertere intendit.**

If a souldier after wages received, or prest money taken, doth absent himself, or depart from the kings service; upon the certificate thereof of the captain into the chancery, there lieth a writ to the kings of serjeants at armes, if the part be vagrant, and hideth himselfe, **ad capitenduum conductos proficiscend. in obsequium**

nostrum, &c. qui ad dictum obsequum nostrum venire non curavenint. And this is **lex terrae**, by processe of law, **pro defensione regis, et regni**, or for the same cause, a writ may be directed to the sheriffe, **de arrestando ipsum; qui pecuniam receipt ad prosiciscendum in obsequium regis, et non est profectus.**

If a man had entered into religion, and was professed, and after he departed from his house, and because vagrant in the country against the rules of his religion, upon the certificate of the abbot, or prior thereof into the chancery, a writ should be directed to the sheriffe, **de apostata capiendo**, whereby he was commanded in these words; **praecipimus tibi quad praefatum, &c. fine dilatione arrestes, et praefat. abbat. &c. liberes secundum regulam ordinis sui caftigand"**; and this was **lex terrae**, by processe of law, **in bonorem religionis.**

If any lay men with force and strong hand, doe enter upon, or keep the possession either of the church, or of any of the houses, or glebe, &c. belonging thereunto, the incumbent upon certificate may have a writ to the sheriffe, de vi laica amovenda, by which the vim laicam feuu armatam, quuefe tenet in dicla ecclesia, seu domibus eidem annexis, and pacem nostram in com. tuo perturband. fine dilatione amoveas; et fi quos in hac parte refistentes inveneris, eos per corpora sua attachias, et in prisona nostra jalvo custodias, &c. and this is is lex terrae, by processe of law, pro pace ecclesiae.

Also a writ of ne exeas regnum may be awarded to the sheriffe, or justices of peace, or to both, that a man of the church shall not depart the realme....And there is another writ in the Register directed to the party either of the clergy or laity. And this is lex terrae, by process of law, pro

bono publico regis et regni; whereof you may reade more at large in the third part of the Inftitutes, cap. Fugitives.

Upon a surmise that a man is a leper, one that hath morbum elephantiacum, so called, because he hath a skin like to an elephant, there may be a writ directed to the sheriffe, quia accepimus quod I. de N. leprofus existit, et inter homines comitatus tui communiter converfatur, &c. ad grave damnum homin' praed. et propter contagionem morbi praed. periculum manifestum. &c. tibi praeciptimus quod assumptis tecum aliquibus difcretis et legalibus hominibus de comitat. praed. nonsuspect', &c. ad ipsum I. accedas, &c. et examines, &c. et fi ipfum leprofum inveneris, ut praedict' est, tunc ipsum honestiori modo, quo poteris a communione hominum praedict' amoveri, et fe ad locum solitarium ad habitand' ibidem, prout moris est, transferre facias indilate, &c. And this is lex terrae, by processe of law, for

saving of the people from contagion and infection.

But if any man by colour of any authority, where he hath not any in that particular case, arrest, or imprison any man, or cause him to be arrested, or imprisoned, this is against this act, and it is most hatefull, when it is done by countenance of justice.

King Edw. 6 did incorporate the town of S. Albons, and granted to them to make ordinances, &c. they made an ordinance upon paine of imprisonment, and it was adjudged to be against this statute of **Magna Charta**; so it is, if such an ordinance had been contained in the patent it selfe.

All commissions that are consonant to this act, are, as hath been said. **fecundum legen, et confuetudinem Angliae.**

A commission was made under the great seale to take I.N. (a notorious felon) and to selle his lands, and goods: this was resolved to be against the law of the land, unlesse he had been endicted, or appealed by the party, or by other due processe of law.

It is enacted, if any man be arrested, or imprisoned against the forme of this great charter, that he bee brought to his answer, and have right.

No man to be arrested, or imprisoned contrary to the forme of the great charter.

* * *

Now it may be demanded, if a man be taken, or committed to prison **contra legem terrae**, against the law of the land, what remedy hath the party aggrieved? To this it is answered: first, that every act of parliament made against any injury, mischiefe, or grievance doth either

espressly, or impliedly give a remedy to the party wronged, or grieved: as in many of the chapters of this great charter doth appeareth; and therefore he may have an action grounded upon this great charter. As taking one example for many, and that in a powerfull, and a late time. Pasch. 2 H. 8 **coram rege** rot. 538 against the prior of S. Oswin in Northumberland. And it is provided, and declared by the statute of 36 E. 3 that if any man feeleth himselfe grieved, contrary to any article in any statute, he shall have present remedy in chancery (that is, by originall writ) by force of the said articles and statutes.

2. He may cause him to be indicted upon this statute at the kings suite, whereof you may see a precedent Pasch 3 H. 8. 8 Rogg. 71 **coram rege**. Rob Sheffields case.

3. He may have an **habeas corpus** out of the kings bench or chancery, though there be

no priviledge, &c. or in the court of common pleas, or eschequer, for any officer or priviledged person there; upon which writ the gaoler must retourne, by whom he was committed, and the cause of his imprisonment, and if it appeareth that his imprisonment be just, and lawfull, he shall be remaunded to the former goaler [sic], but if it shall appeare to the court, that he was imprisoned against the law of the land, they ought by force of this statute to deliver him; it it be doubtfull and under consideration, he may be bailed.

* * *

4. He may have an action of false imprisonment....

5. He may have a writ **de homine replegiando**....

6. He might by the common-law have had a writ **de odio, et atia**, as you may see before....

2.

From Blackstone, III Commentaries on the Laws of England, 128-138 (1768):

The means of **removing** the actual injury of false imprisonment are fourfold. 1. By writ of **mainprize**. 2. By writ of **de odio et aia**. 3. By writ **de homine replegiando**. 4. By writ of **habeas corpus**.

* * *

4. The writ of **habeas corpus**, the most celebrated writ in the English law. Of this there are various kinds made use of by the courts at Westminister, for removing prisoners from one court into another for the more eash administration of justice. Such is the **habeas corpus ad respondendum**, when a man hath a cause of action against one who is confined by the process of some inferior court; in order to remove the prisoner, and charge him with this new

action in the court above. Such is that **ad satisfaciendum**, when a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution. Such also are those **ad prosequendum, testificandum, deliberendum, &c.**; which issue when it is necessary to remove a prisoner, in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed. Such is, lastly, the common writ **ad faciendum et recipiendum**, which issues out of any of the courts of Westminister-hall, when a person is used in some inferior jurisdiction, and is desirous to remove the action into the superior court; commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer (whence the writ is frequently denominated an **habeas corpus cum causa**) to

do and receive whatsoever the king's court shall consider in without any motion in court, and it instantly supersedes all proceedings in the court below. But in order to prevent the surreptitious discharge of prisoners, it is ordered by statute 1 & 2 P.& M. c 13, that no **habeas corpus** shall issue to remove any prisoner out of any gaol, unless signed by some judge of the court of which it is awarded. And to avoid vexatious delays by removal of frivolous causes, it is enacted by statute 21 Jac. I. c. 23, that, where the judge of any inferior court of record is a barrister of three years' standing, no cause shall be removed from thence by **habeas corpus** or other writ, after issue or demurrer deliberately joined: that no cause, if once remanded to the inferior court by writ of **procedendo** or otherwise, shall ever afterwards be again removed; and that no cause shall be removed at all, if the debt or damages laid in the declaration do not amount to the sum of five

pounds. But an expedient having been found out to elude the latter branch of the statute, by procuring a nominal plaintiff to bring another action for five pounds or upwards, (and then by the course of the court, the **habeas corpus** removed both actions together), it is therefore enacted by statute 12 Geo. I. c. 29, that the inferior court may proceed in such actions as are under the value of five pounds, notwithstanding other actions may be brought against the same defendant to a greater amount.

But the great and efficacious writ, in all manner of illegal confinement, is that of **habeas corpus ad subjiciendum**; directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, **ad faciendum, subjiciendum, et recipiendum**, to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in

that behalf. This is a high prerogative writ, and therefore by the common law issuing out of the court of king's bench not only in term-time, but also during the vacation, by a fiat from the chief justice or any other of the judges, and running into all parts of the king's dominions: for the king is at all times entitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted. If it issues in vacation, it is usually returnable before the judge himself who awarded it, and he proceeds by himself thereon; unless the term shall intervene, and then it may be returned in court. Indeed if the party were privileged in the courts of common pleas and exchequer, as being an officer or suitor of the court, an habeas corpus ad subjiciendum might also by common law have been awarded from thence; and, if the cause of imprisonment were palpably illegal, they might have discharged him: but, if he were committed

for any criminal matter, they could only have remanded him, or taken bail for his appearance in the court of king's bench; which occasioned the common pleas to discontenance such applications. It hath also been said, and by very respectable authorities, that the like habeas corpus may issue out of the court of chancery in vacation; but upon the famous application to lord Nottingham by Jenks, notwithstanding the most diligent searches, no precedent could be found where the chancellor had issued such a writ in vacation, and therefore his lordship refused it.

In the king's bench and common pleas it is necessary to apply for it by motion to the court, as in the case of all other prerogative writs (certiorari, prohibition, mandamus, &c.) which do not issue as of mere course, without shewing some probable cause why the extraordinary power of the crown is called in to the party's assistance. For, as was argued by lord chief justice Vaughan,

"it is granted on motion, because it cannot be had of course; and there is therefore no necessity to grant it; for the court ought to be satisfied that the party hath a probable cause to be delivered." And this seems the more reasonable, because (when once granted) the person to whom it is directed can return no satisfactory excuse for not bringing up the body of the prisoner. So that, if it issued of mere course, without shewing to the court or judge some reasonable ground for awarding it, a traitor or felon under sentence of a death, a soldier or mariner in the king's service, a wife, a child, a relation, or a domestic, confined for insanity, or other prudential reasons, might obtain a temporary enlargement by suing out an habeas corpus, though sure to be remanded as soon as brought up to the court. And therefore Sir Edward Coke, when chief justice, did not scruple in 13 Jac. I, to deny a habeas corpus to one confined by the court of

admiralty for piracy; there appearing, upon his own shewing, sufficient grounds to confine him. On the other hand, if a probable ground be shewn, that the party is imprisoned without just cause, and therefore hath a right to be delivered, the writ of habeas corpus is then a writ of right, which "may not be denied, but ought to be granted to every man that is committed, or detained in prison, or otherwise restrained, though it be by the command of the king, the privy council, or any other."

In a former part of these commentaries we expatiated at large on the personal liberty of the subject. This was shewn to be a natural inherent right, which could not be surrendered or forfeited unless by the commission of some great and atrocious crime, and which out not to be abridged in any case without the special permission of law. A doctrine coeval with the first rudiments of the English constitution, and handed down to us, from our Saxon ancestors,

notwithstanding all their struggles with the Danes, and the violence of the Norman conquest: asserted afterwards and confirmed by the conqueror himself and his descendants: and though sometimes a little impaired by the ferocity of the times, and the occasional despotism of jealous or usurping princes, yet established on the firmest basis by the provisions of **magna carta**, and long succession of statutes enacted under Edward III. To assert an absolute exemption from imprisonment in all cases, is inconsistent with every ideas of law and political society; and in the end would destroy all civil liberty, by rendering its protection impossible: but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree the imprisonment of the subject may be lawful. This induces the absolute necessity of expressing upon every commitment the reason for which it is made:

that the court upon an **habeas corpus** may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner.

And yet, early in the reign of Charles I, the court of king's bench, relying on some arbitrary precedents (and those perhaps misunderstood) determined that they could not upon an **habeas corpus** either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king, or by the lords of privy council. This drew on a parliamentary inquiry, and produced the **petition of right**, 3 Car. I, which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. But when, in the following year, Mr. Selden and others were committed by the lords of the council, in pursuance of him majesty's special command, under a general charge of "notable contempts and stirring up sedition against the king and government,"

the judges delayed for two terms (including also the long vacation) to deliver an opinion how far such a charge was bailable. And when at length they agreed that it was, they however annexed a condition of finding sureties for the good behavior, which still protracted their imprisonment, the chief justice, sir Nicholas Hyde, at the same time declaring, that "if they were again remanded for that cause, perhaps the court would not afterwards grant a **habeas corpus**, being already made acquainted with the cause of the imprisonment." But this was heard with indignation and astonishment by every lawyer present: according to Mr. Selden's own account of the matter, whose resentment was not cooled at the distance of four-and-twenty years.

These pitiful evasions gave rise to the statute 16 Car. I.c. 10. § 8. whereby it is enacted, that if any person be committed by the king himself in person, or by his privy council, or by any of the members

thereof, he shall granted unto him, without any delay upon any pretence whatsoever, a writ of **habeas corpus**, upon demand or motion made to the court of king's bench or common pleas; who shall thereupon, within three court days the return is made, examine and determine the legality of such commitment, and do what to justice shall appertain, in delivering, bailing, or remanding such prisoner. Yet still in the case of Jenks, before alluded to, who in 1676 was committed by the king in council for a turbulent speech at Guildhall, new shifts and devices were made use of to prevent his enlargement by law, the chief justice (as well as the chancellor) declining to award a writ of **habeas corpus ad subjiciendum** in vacation, though at last he thought proper to award the usual writs **ad deliberendum**, &c, whereby the prisoner was discharged at the Old Bailey. Other abuses had also crept into daily practice, which had in some measure defeated the benefit of this great

constitutional remedy. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and a third, called an alias and a pluries, were issued, before he produced the party; and many other vexatious shifts were practised to detain state-prisoners in custody. But whoever will attentively consider the English history, may observe, that the flagrant abuse of any power, by the crown or its ministers, has always been productive of a struggle; which either discovers the exercise of that power to be contrary to law, or (if legal) restrains it for the future. This was the case in the present instance. The oppression of an obscure individual gave birth to the famous **habeas corpus** act, 31 Car. II. c. 2 which is frequently considered as another **magna carta** of the kingdom; and by consequence and analogy has also in subsequent times reduced the general method of proceeding on these writs (though not

within the reach of that statute, but issuing merely at the common law) to the true standard of law and liberty.

The statute itself enacts, 1. That the writ shall be returned and the prisoner brought up within a limited time according to the distance, not exceeding in any case twenty days. 2. That such writs shall be endorsed as granted in pursuance of this act, and signed by the person awarding them. 3. That on complaint and request in writing by or on behalf of any person committed and charged with any crime, (unless committed for treason or felony expressed in the warrant, or for suspicion of the same, or as accessory thereto before the fact, or convicted or charged in execution by legal process) the lord chancellor or any of the twelve judges, in vacation, upon viewing a copy of the warrant, or affidavit that a copied denied, shall (unless the party has neglected for two terms to apply to any

court for his enlargement) award a habeas corpus for such prisoner, returnable immediately before himself or any other of the judges; and upon the return made shall discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court of judicature. 4. That officers and keepers neglecting to make due returns, or not delivering to the prisoner or his agent within six hours after demand a copy of the warrant of commitment, or shifting the custody of a prisoner from one to another, without sufficient reason or authority, (specified in the act), shall for the first offence forfeit 100l. and for the second offence, on penalty of 200l. to the party grieved, and be disabled to hold office. 5. That no person once delivered by habeas corpus, shall be recommitted for the same offence, on penalty of 500l. 6, That every person committed for treason or felony shall, if he requires it the first week of

the next term, or the first day of the next session of oyer and terminer, be indicted in that term or session, or else admitted to bail; unless the king's witnesses cannot be produced at that time: and if acquitted, or if not indicted and tried in the second term, or session, he shall be discharged from him imprisonment for such imputed offence: but that no person, after the assises shall be open for the county in which he is detained, shall be removed by habeas corpus, till after the assises are ended; but shall be left to the justice of the judgesof the assise. 7. That any such prisoner may move for and obtain his habeas corpus, as well out of the chancery or exchequer, as out of the king's bench or common pleas; and the lord chancellor or judges denying the same, on sight ofthe warrant or oath that the same is refused, forfeit severally to the party grieved the sum of 500l. 8. That this writ of habeas corpus shall run into the counties palatine,

cinque ports, and other privileged places, and the islands of Jersey and Guernsey. 9. That no inhabitant of England (except persons contracting, or convicts praying, to be transported; or having committed some capital offence in the place to which they are sent) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any places beyond the seas, within or without the king's dominions: on pain that the party committing, his advisers, aiders, and assistants, shall forfeit to the party aggrieved a sum not less than 500l. to be recovered with treble costs; shall be disable to bear any office of trust or profit; shall incur the penalties of **praemunire**; and shall be incapable of the king's pardon.

This is the substance of that great and important statute: which extends (we may observe) only to the case of commitments for such criminal charge, as can produce no inconvenience to public justice by a

temporary enlargement of the prisoner: all other cases of unjust imprisonment being left to the **habeas corpus** at common law. But even upon writs at the common law it is now expected by the court, agreeable le to ancient precedents and the spirit of the act of parliament, that the writ should be immediately obeyed, without waiting for any **alias** or **pluries**; otherwise an attachment will issue. By which admirable regulations, judicial as well as parliamentary, the remedy is now complete for **removing** the injury of unjust and illegal confinement. A remedy the more necessary, because the oppression does not always arise from the ill-nature, but sometimes from the mere inattention of government. For it frequently happens in foreign countries, (and has happened in England during temporary suspensions of the statue), that person apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten.

HISTORICAL MATERIALS: Blackstone

The satisfactory remedy for this injury of false imprisonment, is by an action of trespass vi et armis, usually called an action of false imprisonment; which is generally, and almost unavoidably, accompanied with a charge of assault and battery also: and therein the party shall recover damages for the injury he has received; and also the defendant is, as for all other injuries committed with force, or vi et armis, liable to pay a fine to the king for the violation of the public peace.

* * *

3.

The Habeas Corpus Act of 1679, 31 Charles II, c 2; 8 Stat at L 432

WHEREAS great delays have been used by sheriffs, gaolers and other officers, to whose custody, any of the Kings's subjects have been committed for criminal or supposed criminal matters, in making returns of writs of habeas corpus to them directed, by standing out an alias and pluries habeas corpus, and sometimes more, and by other shifts to avoid their yielding obedience to such writs, contrary to their duty ad the known laws of the land, whereby many of the King's subjects have been and hereafter may be long detained in prison, in such cases where by law they are bailable, to their great charges and vexation.

II. For the prevention whereof, and the more speedy relief of all persons imprisoned for any such criminal or supposed criminal

matters; (2) be it enacted by the King's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority thereof, That whensoever any person or persons shall bring any habeas corpus directed unto any sheriff or sheriffs, gaoler, minister or other person whatsoever, for any person in his or their custody, and the said writ shall be served upon the said officer, or left at the gaol or prison with any of the under-officers, under-keepers or deputy of the said officers or keepers, that the said officer or officers, his or their under officers, under-keepers or deputies, shall within three days after the service thereof as aforesaid (unless the commitment aforesaid were for treason or felony, plainly and specially expressed in the warrant of commitment) upon payment or tender of the charges of bringing the said prisoner, to be ascertained by the judge or

court that awarded the same, and endorsed upon the said writ, not exceeding twelve pence per mile, and upon security given by his own bond to pay the charges of carrying back the prisoner, if he shall be remanded by the court or judge to which he shall be brought according to the true intent of this present act, and that he will not make any escape by the way, make return of such writ (3) and bring or cause to be brought the body of the party so committed or restrained, unto or before the lord chancellor, or lord keeper of the great seal of England for the time being, or the judges or barons of the said court from whence the said writ shall issue, or unto and before such other person or persons before whom the said writ is made returnable, according to the command thereof; (4) and shall then likewise certify the true causes of his detainer or imprisonment, unless certify the true causes of his detainer or imprisonment, unless the commitment of the said party be

in any place beyond the distance of twenty miles from the place or places where such court or person is or shall be residing; and if beyond the distance of twenty miles, and not above one hundred miles, then within the space of ten days, and if beyond the distance of one hundred miles, then within the space of twenty days, after such delivery aforesaid, and not longer.

III. And to the intent that no sheriff, gaoler or other officer may pretend ignorance of the import of any such writ; (2) be it enacted by the authority aforesaid, That all such writs shall be marked in this manner, Per statutum tricesimo Caroli secundi Regis, and shall be signed by the person that awards the same; (3) and if any person or persons shall be or stand committed or detained as aforesaid for any crime unless for felony or treason plainly expressed in the warrant of commitment, in the vacation-time, and out of

term, it shall and may be lawful to and for the person or persons so committed or detained (other than persons convict or in execution by legal process) or any one on his or their behalf, to appeal or complain to the lord chancellor or lord keeper, or any one of his Majesty's justices, either of the one bench or of the other, or the barons of the exchequer of the degree of the coif; (4) and the said lord chancellor, lord keeper, justices or barons or any of them, upon view of the copy or copies of the warrant or warrants of commitment and detainer, or otherwise upon oath made that such copy or copies were denied to be given by such persons or persons in whose custody the prisoner or prisoners is or are detained, are hereby authorized and required, upon request made in writing by such person or persons, or any on his, her or their behalf, attested and subscribed by two witnesses who were present at the delivery of the same, to award and grant an

habeas corpus under the seal of such court whereof he shall then be one of the judges, (5) to be directed to the officer or officers in whose custody the party so committed or detained shall be, returnable immediate before the said lord chancellor or lord keeper or such justice, baron or any other justice or baron of the degree of the coif of any of the said courts; (6) and upon service thereof as aforesaid, the officer or officers, his or their under-officer or under-officers, under-keeper or under-keepers, or their deputy in whose custody the party is so committed or detained, shall within the times respectively before limited, bring such prisoner or prisoners before the said lord chancellor or lord keeper, or such justices, barons or one of them, before whom the said writ is made returnable, and in case of his absence before any other of them, with the return of such writ, and the true causes of the commitment and detainer; (7) and

thereupon within two days after the party shall be brought before them, the said lord chancellor or lord keeper, or such justice or baron before whom the prisoner shall be brought as aforesaid, shall discharge the said prisoner from his imprisonment, taking his or their recognizance, with one or more surety or sureties, in any sum according to their discretions, having regard to the quality of the prisoner and nature of the offence, for his or their appearance in the court of King's bench the term following, or at the next assizes, sessions or general gaol-delivery of and for such county, city or place where the commitment was, or where the offence was committed, or in such other court where the said offence is properly cognizable, as the case shall require, and then shall certify the said writ with the return thereof, and the said recognizances into the said court where such appearance is to be made; (8) unless it shall appear unto the said lord chancellor or lord keeper or

justice or justices, or baron or barons, that the party so committed is detained upon a legal process, order or warrant, out of some court that hath jurisdiction of criminal matters, or by some warrant signed and sealed with the hand and seal of any of the said justices or barons, or some justice or justices of the peace, for such matters or offences for the which by the law the prisoner is not bailable.

IV. Provided always, and be it enacted, That if any person shall have wilfully neglected by the space of two whole terms after his imprisonment, to pray a habeas corpus for his enlargement, such person so wilfully neglecting shall not have any habeas corpus to be granted in vacation-time, in pursuance of this act.

V. And be it further enacted by the authority aforesaid. That if any officer or officers, his or their under-officer or under-officers, under-keeper or under-

keepers, or deputy, shall neglect or refuse to make the returns aforesaid, or to bring the body or bodies of the prisoner or prisoners according to the command of the prisoner or prisoners according to the command of the said writ, within the respective times aforesaid, or said writ, within the respective times aforesaid, or upon demand made by the prisoner or person in his behalf, shall refuse to deliver, to the person so demanding, a true copy of the warrant or warrants of commitment and detainer of such prisoner, which he and they are hereby required to deliver accordingly; all and every the head gaolers and keepers of such prisons, and such other person in whose custody the prisoner shall be detained, shall for the first offence forfeit to the prisoner or party grieved the sum of one hundred pounds; (2) and for the second offence the sum of two hundred pounds; and shall and is hereby made incapable to hold or execute his said

office; (3) the said penalties to be recovered by the prisoner or party grieved, his executors or administrators, against such offender, his executors or administrators, by any action of debt, suit, bill, plaint or information, in any of the King's courts at Westminister, wherein no essoin, protection, privilege, injunction, wager of law, or stay of prosecution, by Non vult ulterius prosequi, or otherwise, shall be admitted or allowed, or any more than one imparlance; (4) and any recovery or judgment at the suit of any party grieved, shall be a sufficient conviction for the first offence; and any after recovery or judgment at the suit of a party grieved for any offence after the first judgment, shall be a sufficient conviction to bring the officers or person within the said penalty for the second offense.

VI. And for the prevention of unjust vexation by reiterated commitments for the

same offence; (2) be it enacted by the authority aforesaid, That no person or persons which shall be delivered or set at large upon any habeas corpus, shall at any time hereafter be again imprisoned or committed for the same offence by any person or persons whatsoever, other than the legal order and process of such court wherein he or they shall be bound by recognizance to appear, or other court having jurisdiction of the cause, (3) and if any other person or persons shall knowingly procure or cause to be recommitted or imprisoned, for the same offence or pretended offence, any person or persons delivered or set at large as aforesaid, or be knowingly aiding or assisting therein, then he or they shall forfeit to the prisoner or party grieved the sum of five hundred pounds; any colourable pretence or variation in the warrant or warrants of commitment notwithstanding, to be recovered as aforesaid.

VII. Provided always, and be it further enacted, That if any person or persons shall be committed for high treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer or petition in open court the first week of the term, or first day of the sessions of oyer and terminer or general gaol-delivery, to be brought to his trial, shall not be indicted some time in the next term, sessions of oyer and terminer or general gaol-delivery, after such commitment; it shall and may be lawful to and for the judges of the court of King's bench and justices of oyer and terminer or general gaol-delivery, and they are hereby required, upon motion to them made in open court the last day of the term, sessions or gaol-delivery, either by the prisoner or any one in his behalf, to set at liberty the prisoner upon bail, unless it appear to the judges and justices upon oath made, that the witnesses for the King could not be produced the same term, sessions or general gaol-

delivery; (2) and if any person or persons committed as aforesaid, prayer or petition in open court the first week of the term or upon his first day of the sessions of oyer and terminer and general gaol-delivery, to be brought to his trial, shall not be indicated and tried the second term, sessions of oyer and terminer or general gaol-delivery, after his commitment, or upon his trial shall be acquitted, he shall be discharged from his imprisonment.

VIII. Provided always, That nothing in this act shall extend to discharge out of prison any person charged in debt, or other action, or with process in any civil cause, but that after he shall be discharged of his imprisonment of such his criminal offence, he shall be kept in custody according to the law, for such other suit.

IX. Provided always, and be it enacted by the authority aforesaid, That if any

person or persons, subjects of this realm, shall be committed to any prison or in custody of any officer or officers whatsoever, for any criminal or supposed criminal matter, that the said person shall not be removed from the said prison and custody into the custody of any other officer or officers; (2) unless it be by habeas corpus or some other legal writ; or where the prisoner is delivered to the constable or other inferior officer to carry such prisoner to some common gaol; (3) or where any person is sent by order of any judge of assize or justice of the peace, to any common work-house or house of correction; (4) or where the prisoner is removed from one prison or place to another within the same county, in order to his or her trial or discharge in due course of law; (5) or in cas of sudden fire or infection, or other necessity; (6) and if any person or persons shall after such commitment aforesaid make out and sign, or countersign

any warrant or warrants for such removal aforesaid, contrary to this act; as well he that makes or signs, or countersigns such warrant or warrants, as the officer or officers that obey or execute the same, shall suffer the [and] incur the pains and forfeitures in this act before mentioned, both for the first and second offence respectively, to be recovered in manner aforesaid by the party grieved.

X. Provided also, and be it further enacted by the authority aforesaid, That it shall and may be lawful to and for any prisoner and prisoners as aforesaid, to move and obtain his or their habeas corpus as well out of the high court of chancery or court of exchequer, as out of the courts of King's bench or common pleas, or either of them; (2) and if the said lord chancellor or lord keeper, or any judge or judges, baron or barons for the time being, of the degree of the coif, of any of the occurs aforesaid,

in the vacation time, upon view of the copy or copies of the warrant or warrants of commitment or detainer, or upon oath made that such copy or copies were denied as aforesaid, shall deny any writ of habeas corpus by this act required to be granted, being moved for a aforesaid, they shall severally forfeit to the prisoner or party grieved the sum of five hundred pounds, to be recovered in manner aforesaid.

XI. And be it declared and enacted by the authority aforesaid, That an habeas corpus according to the true intent and meaning of this act, may be directed and run into any county palatine, the cinque-ports, or other privileged places within the kingdom of England, dominion of Wales, or town of Berwick upon Tweed, and the islands of Jersey or Guernsey; any law or usage to the contrary notwithstanding.

XII. And for preventing illegal imprisonments in prisons beyond the seas; (2) be it further enacted by the authority aforesaid, That no subject of this realm that now is, or hereafter shall be an inhabitant or resiant of this kingdom of England, dominion of Wales, or town of Berwick upon Tweed, shall or may be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands or places beyond the seas, which are or at any time hereafter beyond shall be within or without the dominions of his Majesty, his heirs or successors; (3) and that every such imprisonment is hereby enacted and adjudged to be illegal; (4) and that if any of the said subjects now is or hereafter shall be so imprisoned, every such person and persons so imprisoned, shall and may for every such imprisonment maintain by virtue of this act an action or actions of false imprisonment, in any of his Majesty's courts of record, against the person or

persons by whom he or she shall be so committed, detained, imprisoned, sent prisoner or transported, contrary to the true meaning of this act, and against all or any person or persons that shall frame, contrive, write, seal or countersign any warrant or writing for such commitment, detainer, imprisonment or transportation, or shall be advising, aiding, or assisting in the same, or any of them; (5) and the plaintiff in every such action shall have judgment to recover his treble costs, besides damages, which damages so to be given, shall not be less than five hundred pounds; (6) in which action no delay stay or stop of proceeding by rule, order or command, nor no injunction, protection or privilege whatsoever, nor any more than one imparlance shall be allowed excepting such rule of the court wherein the action shall depend, made in open court, as shall be thought in justice necessary, for special cause to be expressed in the said rule; (7)

and the person or persons who shall knowingly frame, contrive, write, seal or countersign any warrant for such commitment, detainer or transportation, or shall so commit, detain, imprison or transport any person or persons contrary to this act, or be any ways advising aiding or assisting therein, being lawfully convicted thereof, shall be disabled from thenceforth to bear any office of trust or profit within the said realm of England, dominion of Wales, or town of Berwick upon Tweed, or any of the islands, territories or dominions thereunto belonging; (8) and shall incur and sustain the pains, penalties and forfeitures limited, ordained and provided in and by the statute of provision and praemunire made in the sixteenth year of King Richard the Second; (9) and be incapable of any pardon from the King, his heirs or successors, of the said forfeitures, losses or disabilities, or any of them.

XIII. Provided always, That nothing in this act shall extend to give benefit to any person who shall by contract in writing agree with any merchant or owner of any plantation, or other person whatsoever, to be transported to any parts beyond the seas, and receive earnest upon such agreement, although that afterwards such person shall renounce such contract.

XIV. Provided always, and be it enacted, That if any person or persons lawfully convicted of any felony, shall in open court pray to be transported beyond the seas, and the court shall think fit to leave him or them in prison for that purpose, such person or persons maybe transported into any parts beyond the seas; this act or anything therein contained to the contrary notwithstanding.

XV. Provided also, and be it enacted, That nothing herein contained shall be

deemed, construed or taken, to extend to the imprisonment of any person before the first day of June on e thousand six hundred seventy and nine, or to any thing advised, procured, or otherwise done, relating to such imprisonment; anything herein contained to the contrary notwithstanding.

XVI. Provided also, That if any person or persons at any time resiant in this realm, shall have committed any capital offence in Scotland or Ireland, or any of the islands or foreign plantations of the King, his heirs or successors, where he or she ought to be tried for such offence, such person or persons may be sent to such place, there to receive such trial, in such manner as the same might have been used before the making of this act; any thing herein contained to the contrary notwithstanding.

XVII. Provided also, and be it enacted, That no person or persons shall be sued, impleaded, molested, or troubled for any offence against this act, unless the party offending be sued or impleaded for the same within two years at the most after such time wherein the offence shall be committed, in case the party grieved shall not be then in prison; and if he shall be in prison, then within the space of two years after the decease of the person imprisoned, or his or her delivery out of prison, which shall first happen.

XVIII. And to the intent no person may avoid his trial at the assizes or general gaol-delivery, by procuring his removal before the assizes, at such time as he cannot be brought back to receive his trial there; (2) be it enacted, That after the assizes proclaimed for that county where the prisoner is detained, no person shall be removed from the common gaol upon any habeas

corpus granted in pursuance of this act, but upon any such habeas corpus shall be brought before the judge of assize in open court, who is thereupon to do what to justice shall appertain.

XIX. Provided nevertheless, That after the assizes are ended, any person or persons detained, may have his or her habeas corpus according to the direction and intention of this act.

XX. And be it also enacted by the authority aforesaid, That if any information, suit or action shall be brought or exhibited against any person or persons for any offence committed or to be committed against the form of this law, it shall be lawful for such defendants to plead the general issue, that they are not guilty, or that they owe nothing, and to give such special matter in evidence to the jury that shall try the same, which matter being

pleaded had been good and sufficient matter in law to have discharged the said defendant or defendants against the said information, suit or action, and the said matter shall be then as available to him or them, to all intents and purposes, as if he or they had sufficiently pleaded, set forth or alleged the same matter in bar or discharge of such information, suit or action.

XXI. And because many time persons charged with petty treason or felony, or as accessaries thereunto, are committed upon suspicion only, whereupon they are bailable, or not, according as the circumstances making out that suspicion are more or less weight, which are best known to the justices of peace that committed the persons, and have the examinations before them, or to other justices of the peace in the county; (2) be it therefore enacted, That where any person shall appear to be committed by any judge or justice of the peace and charged as

accessary before the fact, to any petty treason or felony, or upon suspicion thereof, or with suspicion of petty treason or felony, which petty treason or felony shall be plainly and specially expressed in the warrant of commitment, that such person shall not be removed or bailed by virtue of this act, or in any other manner than they might have been before the making of this act.

4.

Habeas Provisions of the Judiciary Act of 1789, 1 Stat 73, 81-82.

....**And be it further enacted.** That all the before-mentioned courts of the United States, shall have power to issue writs of **scire facias, habeas corpus**, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have the power to grant writs of **habeas corpus** for the purpose of an inquiry into the cause of commitment. -- **Provided**, That writs of **habeas corpus** shall in no case extend to prisoners in gaol, unless where they are in custody, under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

5.

The Habeas Corpus Act of 1867, 14 Stat 385

* * *

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States; and it shall be lawful for such person so restrained of his or her liberty to apply to either of said justices or judges for a writ of habeas corpus, which application shall be in writing and verified by affidavit, and shall set forth the facts concerning the

detention of the party applying, in whose custody he or she is detained, and by virtue of what claim or authority, if known; and the said justice or judge to whom such application shall be made shall forthwith award a writ of habeas corpus, unless it shall appear from the petition itself that the party is not deprived of his or her liberty in contravention of the constitution or laws of the United States. Said writ shall be directed to the person in whose custody the party is detained, who shall make return of said writ and bring the party before the judge who granted the writ, and certify the true cause of the detention of such person within three days thereafter, unless such person be detained beyond the distance of twenty miles; and if beyond the distance of twenty miles and not above one hundred miles, then within ten days; and if beyond the distance of one hundred miles, then within twenty days. And upon the return of the writ of habeas of corpus a day

shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning shall request a longer time. The Petitioner may deny any of the material facts set forth in the return, or may allege any fact to show that the detention is on contravention of the constitution or laws of the United States, which allegations or denials shall be made on oath. The said return may be amended by leave of the court or judge before or after the same is filed, as also may all suggestions made against it, that thereby the material facts may be ascertained. The said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of parties interested, and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty. And if any person or

persons to whom such writ of habeas corpus may be directed shall refuse to obey the same, or shall neglect or refuse to make return, or shall make a false return thereto, in addition to the remedies already given by law, he or they shall be deemed and taken to be guilty of a misdemeanor, and shall, on conviction before any court of competent jurisdiction, be punished by fine not exceeding one thousand dollars, and by imprisonment not exceeding one year, or by either, according to the nature and aggravation of this case. From the fine decision of any judge, justice, or court, inferior to the circuit court, an appeal may be taken to the circuit court of the United States for the district in which said cause is heard, and from the judgment of said circuit court to the Supreme Court of the United States, on such terms and under such regulations and orders, as well for the custody and appearance of the person alleged to be restrained of his or her liberty, as

for sending up to the appellate tribunal a transcript of the petition, writ of habeas corpus, return thereto, and other proceedings, the judge hearing said cause may prescribe; and pending such proceedings or appeal, and until final judgment be rendered therein, and after final judgment of discharge in the same, any proceeding against such person so alleged to be restrained of his or her liberty in any State court, or by or under the authority of any State, for any matter or thing so heard and determined, or in process of being heard and determined, under and by virtue of such writ of habeas corpus, shall be deemed null and void.

Sec. 2. And be it further enacted, That a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised

under, the United States, and the decision is against their validity, or where is drawn in question the validity of a statute or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such their validity, or where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed [by a] party under such constitution, treaty, statute, commission, or [other law] may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon a writ of error, the citation being signed by the chief justice, or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by justice of the Supreme

Court of the United States, in the same manner, and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a court of the United States; and the proceeding upon the reversal shall also be the same, except that the Supreme Court may, at their discretion, proceed to a final decision of the same, and award execution, or remand the same to an inferior court. This act shall not apply to the case of any person who is or may be held in the custody of the military authorities of the United States, charged with any military offence, or with having aided or abetted rebellion against the government of the United States prior to the passage of this act.

APPROVED, February 5, 1867.

6.

1874 Recodification of the Federal Habeas Statutes, RS 751-766, Title XIII.

THE JUDICIARY. - CH. 13. CHAPTER THIRTEEN. HABEAS CORPUS.

Sec. 751. The Supreme Court and the circuit and district courts shall have power to issue writs of habeas corpus.

Sec. 752. The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.

Sec. 753. The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or

omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the Unites States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify.

Sec. 754. Application for writ of habeas corpus shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth in the complaint shall be verified by the oath of the person making the application.

Sec. 755. The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained.

Sec. 756. Any person to whom such writ is directed shall make due return thereof within three days thereafter, unless the party be detained beyond the distance of twenty miles; and if beyond the distance and not beyond a distance of a hundred miles, within ten day; and if beyond the distance of a hundred miles, within twenty days.

Sec. 757. The person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is returnable the true cause of the detention of such party.

Sec. 758. The person making the return shall at the same time bring the body of the party before the judge who granted the writ.

Sec. 759. When the writ is returned, a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning requests a longer time.

Sec. 760. The petitioner or the party imprisoned or restrained may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended, by leave of the court, or justice, or judge, before or after the same are filed, so that thereby the material facts may be ascertained.

Sec. 761. The court, or justice, or judge shall proceed in a summary way to determine

the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.

Sec. 762. When a writ of habeas corpus is issued in the case of any prisoner who, being a subject or citizen of a foreign state and domiciled therein, is committed, or confined, or in custody, by or under the authority or law of any one of the United States, or process founded thereon, on account of any act done or omitted under an alleged right, title, authority, privilege, protection, or exemption, claimed under the commission or order or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations, notice of the said proceeding, to be prescribed by the court, or justice, or judge at the time of granting said writ, shall be served on the attorney-general or other officer prosecuting the

pleas of said State, and due proof of such service shall be made to the court, or justice, or judge before the hearing.

Sec. 763. From the final decision of any court, justice, or judge inferior to the circuit court, upon an application for a writ of habeas corpus or upon such writ when issued, an appeal may be taken to the circuit court for the district in which the cause is heard:

1. In the case of any person alleged to be restrained of his liberty in violation of the Constitution, or of any law or treaty of the United States.

2. In the case of any prisoner who, being a subject or citizen of a foreign state, and domiciled therein, is committed or confined, or in custody by or under the authority or law of the United States, or of any State, or process founded thereon, for or on account of any act done or omitted

under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, order, or sanction of any foreign state or sovereignty, the validity and effect where of depend upon the law of nations, or under color thereof.

Sec. 764. From the final decision of such circuit court an appeal may be taken to the Supreme Court in the cases described in the last clause of the preceding section.

Sec. 765. The appeals allowed by the two preceding sections shall be taken on such terms, and under such regulations and orders, as well for the custody and appearance of the person alleged to be in prison or confined or restrained of his liberty, as for sending up to the appellate tribunal a transcript of the petition, writ of habeas corpus, return thereto, and other proceedings, as may be prescribed by the

Supreme Court, or in default thereof, by the court or judge hearing the cause.

Sec. 766. Pending the proceedings or appeal in the cases mentioned in the three preceding sections, and until final judgment therein, and after final judgment of discharge, any proceeding against the person so imprisoned or confined or restrained of his liberty, in any State court, or by or under the authority of any State, for any matter so heard and determined, or in process of being heard and determined, under such writ of habeas corpus, shall be deemed null and void.

APPENDIX D

Growth of State Habeas Corpus Petitions, 1941-1990

Table D

Year	District Court (Total)	State Habeas	Appeals (Total)	Appeals (Habeas)
1941	n/a	127	n/a	n/a
1942	n/a	130	n/a	n/a
1943	n/a	269	n/a	n/a
1944	n/a	605	n/a	n/a
1945	n/a	536	n/a	n/a
1946	n/a	492	n/a	n/a
1947	n/a	485	n/a	n/a
1948	n/a	543	n/a	n/a
1949	n/a	584	n/a	n/a
1950	n/a	560	n/a	n/a
1951	n/a	482	2,982	n/a
1952	n/a	541	3.079	n/a
1953	n/a	548	3,236	n/a
1954	n/a	597	3,481	n/a
1955	n/a	660	3,695	n/a
1956	n/a	734	3,588	n/a
1957	n/a	778	3,701	n/a

1958	n/a	755	3,694	n/a
1959	n/a	822	3,754	n/a
1960	n/a	871	3,899	111
1961	n/a	906	4,204	n/a
1962	n/a	1,232	4,823	n/a
1963	n/a	2,106	5,437	n/a
1964	66,930	3,694	6,023	n/a
1965	67,678	4,845	6,766	571
1966	70,027	5,339	7,183	668
1967	70,961	6,201	7,903	792
1968	71,449	6,201	9,116	1,069
1969	77,193	7,359	8,528	1,197
1970	87,321	9,063	9,661	1,319
1971	93,396	8,372	12,788	1,261
1972	96,173	7,949	15,629	1,319
1973	98,560	7,784	15,629	1,301
1974	103,530	7,626	16,436	1,084
1975	117,320	7,843	16,658	871
1976	130,597	7,833	18,408	866
1977	130,567	6,866	19,118	837
1978	138,770	7,033	18,918	676
1979	154,666	7,123	20,219	859
1980	168,789	7,031	23,200	1,020

Table D

1981	180,576	7,790	26,362	1,258
1982	206,193	8,059	23,551	1,529
1983	241,842	8,532	29,630	1,683
1984	261,485	8,349	26,606	1,609
1985	273,670	8,520	33,360	2,172
1986	254,828	9,040	34,292	2,331
1987	238,982	9,524	35,176	2,755
1938	239,634	9,867	37,524	3,101
1989	233,529	10,545	39,734	3,168
1990	217,879	10,817	40,898	3,170

Source: Adm Off of US Courts, Annual Report of the Director (1960-1990).

Figure D-1

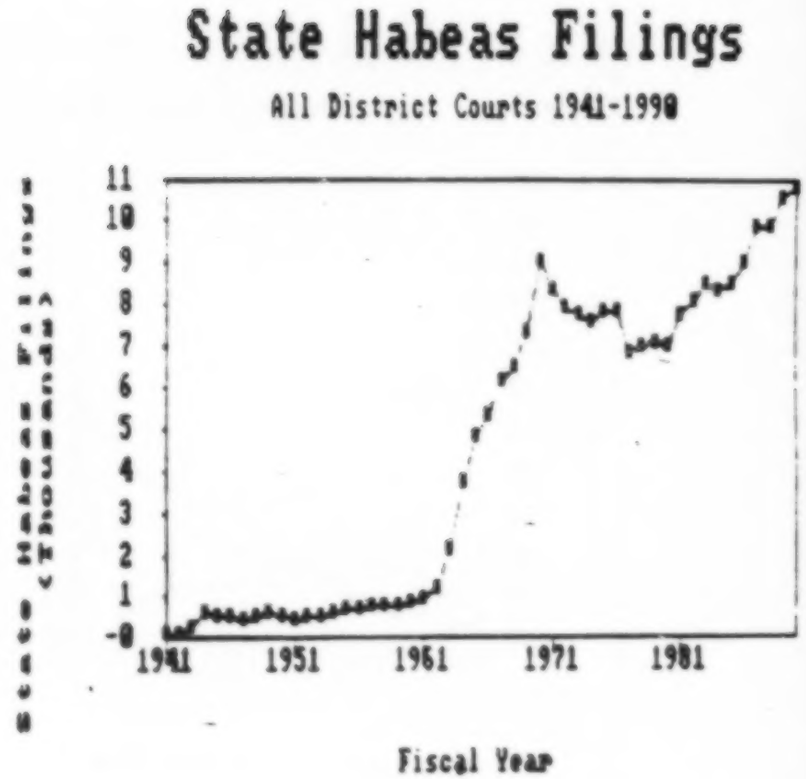
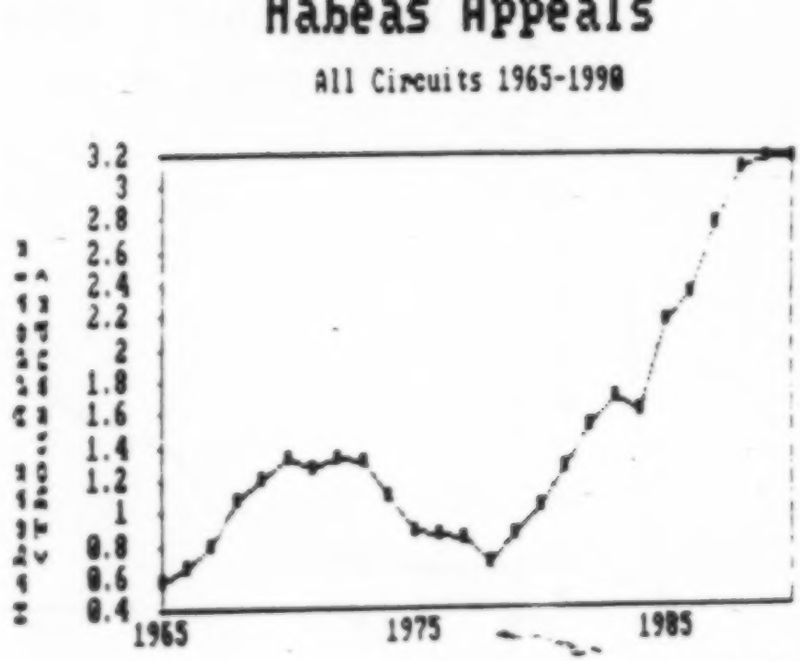


Figure D-2

Figure D-3



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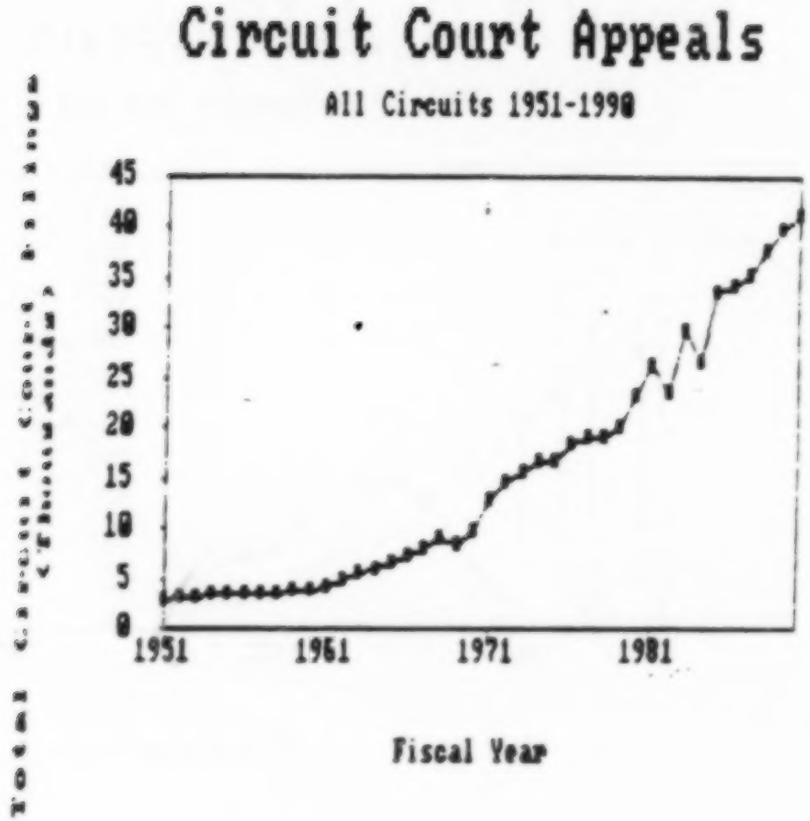
Circuit Court Appeals
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Supreme Court, U.S.
FILED
AUG 13 1992
OFFICE OF THE CLERK

No. 91-1030

In The

Supreme Court of the United States

October Term, 1992

PAMELA WITHROW,

Petitioner,

vs.

ROBERT ALLEN WILLIAMS, JR.,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the rule announced in *Stone v. Powell*, 428 U.S. 465 (1976), should be extended to bar a federal court from entertaining a state prisoner's habeas corpus petition alleging that he is in custody under a conviction secured by the State's use, as evidence of guilt, of statements he made in response to custodial police interrogation without having received any of the procedural safeguards mandated by *Miranda v. Arizona*, 384 U.S. 436 (1966).

2. Whether the State's express waiver of reliance on any exhaustion argument in the Sixth Circuit makes it inappropriate for this Court to consider that issue.

3. Whether the lower courts' reliance on settled principles governing voluntariness of confessions presents any issue under this Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989).

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STATEMENT OF THE CASE

The Interrogation

On April 6, 1985, police officers in Romulus, Michigan, discovered two men shot to death in a parked car. After obtaining information that Robert Williams may have been involved in the shootings, two officers visited his home on the morning of April 10th. They were admitted by Mr. Williams' mother, who told them her son was asleep. The officers requested that Mr. Williams be awakened and brought downstairs. They then informed him that they wanted to question him at the station. Mr. Williams was searched, placed in the police car, and brought to the stationhouse for questioning (C.A. App. 226a, 234a-35a, 238a-39a).[1] Although the officers later testified that Williams was not under arrest when brought to the police station, the official form they filled out at the time states that he was arrested at his residence (C.A. App. 235a-36a).

At the police station, interrogation commenced immediately. The officers began by informing Mr. Williams, who was alone, that he had "big problems," that substantial evidence implicating him in the murders had already been gathered, and that "[t]here's gonna be two life sentences here."[2]

---

[1] "C.A. App." refers to the Joint Appendix filed in the court below.

[2] The verbatim statements made by the police at the outset of the interrogation were as follows (C.A. App. 38a-39a):

Sgt. Early:	For starters, you've got big problems.
Williams:	I do, huh.
Sgt. Early:	Big problems. You got people that are gonna testify that put you with this gun. That are gonna testify that you had it, when you had it, where you had it.
Off. Ondejko:	There's gonna be two life sentences here. This ain't no game.
Sgt. Early:	We're about that far right now from getting a warrant for you. You may not have been the shooter. You supplied the gun and know what happened. We think you were probably there, and we think we can prove it.

Notwithstanding these statements, which the District Court found were delivered in a "serious and accusatory" tone (Pet. App. 47a), no *Miranda* warnings were given. When Williams denied having been at the scene of the crime, the officers continued questioning him about the offense and his whereabouts, assuring him that

> the main thing on this is we want the shooter. We're not real interested in who was there or who was along for the ride or anything else. We get the shooter on this and we're gonna be pretty well content. (Pet. App. 47a).

During the interrogation, the officers specifically considered whether to advise Mr. Williams of his *Miranda* rights and decided not to. The tape recording of the interrogation session reveals that one officer asked the other in a low voice, "Did you read him his rights?", and his partner responded in a hushed lower voice, "Not yet." At no time did the police suggest that Williams was free to leave if he wished. In fact, shortly after concluding not to advise Williams of his rights, the interrogators made the following statement (Pet. App. 47a-48a) (emphasis added):

> You know everything that went down. You just don't want to talk about it. What it's gonna amount to is *you can talk about it now* and give us the truth and we're gonna check it out and see if it fits, *or else we're simply gonna charge you and lock you up* and you can just tell it to a defense attorney and let him try and prove differently. We're not playing. We've been chasing around this too fuckin' long.

Even after being told that if he did not answer his interrogators' questions he would be formally charged and locked up, Mr. Williams was *still* not advised of his constitutional rights. He then admitted he had provided the murder weapon and told police where the gun and certain items of clothing connected with the murders could be found. The police officers continued to suggest that they were interested only in finding the shooter, but they accused Williams of holding something back and lying himself into a corner. Only then, after forty minutes of questioning in which, as Sergeant

Early, the detective who conducted the principal interrogation, testified, Williams "began to implicate himself" (J.A. 13a), was Williams advised of his *Miranda* rights.

Following these warnings, interrogation continued at length, beginning with the following (Pet. App. 60a-62a):

Sgt. Early:	You're being charged with murder in the first.
Williams:	Why?
Off. Ondejko:	Because you won't level with us.
Sgt. Early:	Do you understand your rights?
Williams:	Yeah. [nearly inaudible after a long pause].
Sgt. Early:	Do you wish to make any further statements at this time?
Off. Ondejko:	Do you wish to change your story? [softly]
Williams:	What difference is it going to make?
Off. Ondejko:	It's gonna make a lot of difference to you.
Sgt. Early:	I told you. If you told the truth –
Williams:	[interrupting Early] I've been telling you the truth.
Sgt. Early:	Oh, you've been making up fairy tales ever since you've been in here. You're giving us, like he says, parts of the truth, parts of what you want us to believe, and part of what really happened [angrily].
Williams:	If I tell you everything that happened, I'm gonna walk outta here, huh?
Off. Ondejko:	Someday you may stand a chance of walking.
Sgt. Early:	I'll make you a deal. You tell us everything that happened and you

> tell us the truth and I confirm it on a polygraph that you're telling us the truth. Yeah, you walk.

Sergeant Early repeated that "[t]omorrow you can walk out of here if you're telling me the truth" (Pet. App. 62a). Williams then made several further admissions. Although he had previously denied having been at the scene of the crime, he now admitted he had followed the two slain men and Mark Sennett, the individual he identified as the shooter, to the scene. He admitted he had heard and seen the shootings, driven the getaway car, and disposed of the murder weapon and Sennett's clothing. He denied having known that Sennett was going to kill the victims. (Pet. App. 5a-6a).

Custodial interrogation of Robert Williams continued on April 11th and 12th. Late in the day on April 12th, he was formally charged with murder and arraigned.

State Court Proceedings

Prior to trial, Williams moved to suppress all of the statements he had made under police interrogation on the grounds, *inter alia*, that the statements "were involuntary in nature and were taken in violation of Defendant's rights under the 4th, 5th, and 6th Amend. of the Constitution" (J.A. 7a). His counsel argued not only that his pre-*Miranda* statements were inadmissible under the U.S. and Michigan constitutions, but also that his subsequent custodial statements were involuntary because of the repeated and misleading promises of leniency by the police (J.A. 37a, 57a). At the suppression hearing, the prosecutor admitted that "[i]t could have been that the police officers may have made a mistake in not advising him of his rights prior to" the time he was finally warned. He argued, however, that Williams' post-*Miranda* statements were not involuntary (J.A. 42a).

The trial court suppressed the statements made on April 11th and 12th under Michigan law because they were the product of an "unnecessary delay" in arraigning the defendant that "was for the purpose of extracting inculpatory statements" (Pet. App. 90a-91a). The court declined to suppress

any of the statements made by Williams on April 10th. Concluding that Williams had not been in custody before he was given *Miranda* warnings, the trial judge found no constitutional violation in the admission of the unwarned statements. The court did not specifically address Williams' argument that his post-warning statements were involuntary: it simply ruled that his waiver of *Miranda* rights rendered his subsequent statements admissible (Pet. App. 90a).

The statements made by Mr. Williams during his April 10th interrogation figured prominently at his bench trial. The prosecutor's opening statement highlighted the fact that after "suspicion focused on Mr. Robert Williams, who was then taken downtown, so to speak," Williams had "admitted to being present at the time of the shooting but simply sa[id] I was the driver" (Trial Tr. Vol. I, at 7-8). Sergeant Early testified about Williams' admissions on April 10th, and the tape of his pre-*Miranda* interrogation was played at the trial (J.A. 67a-86a). In closing, the prosecution argued that Mr. Williams' statements were critical evidence to establish the salient facts – that he was present at the scene, provided and disposed of the murder weapon, and drove the getaway car. The prosecutor also argued that Williams' statements and conduct during the interrogation provided evidence of his "mind set" (C.A. App. 284a; *see also id.*, at 286a-87a).

In rendering its verdict of guilty, the trial court adopted this view. Stating that the "crux of the case" was the "mental attitude and knowledge of this defendant" (*id.*, at 308a), the court repeatedly referenced both the admissions and the inconsistencies in Williams' April 10th statements, which the Court held (*id.*, at 310a),

> taxes its credulity to believe that this defendant was not knowledgeable and aware of what was going on. Originally he said he wasn't even there and subsequently changed his mind to the fact that yes, he was there but didn't know what was happening.

The court sentenced Williams to two consecutive life terms.

On appeal, the Michigan Court of Appeals affirmed the trial court's refusal to suppress the April 10th statements (C.A. App. 121a). The Michigan Supreme Court denied leave

to appeal (C.A. App. 197a). Williams' *pro se* petition for a writ of certiorari to this Court (*id.*, at 198a) was denied in November 1989. *Williams v. Michigan*, 493 U.S. 956 (1989).

District Court Proceedings

In January 1990, Mr. Williams filed a *pro se* petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan. The petition alleged as its principal ground for relief "Violation of MIRANDA RIGHTS" (C.A. App. 9a). Warden Withrow answered only that "Police need not give *Miranda*-warnings to persons who are not in police custody" (C.A. App. 16a). She did not suggest any bar to consideration of the issue on its merits. Following a full examination of the state-court record, which included a review of the tape recordings of all of Williams' interrogations,[3] the District Court ordered the writ to issue.

The District Court accorded all state-court findings of fact the presumption of correctness required by 28 U.S.C. § 2254(d) (Pet. App. 43a). The court correctly recognized "that the overall question of whether petitioner was in custody is a mixed question of fact and law which requires an independent federal determination" (*id.*). Applying *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Berkemer v. McCarty*, 468 U.S. 420 (1984), to the state-court fact findings and the tape of the pre-warning interrogation session, the court found that, while Mr. Williams "may have been in custody" even at the time he was brought to the police station, in any event, given

[3] Pet. App. 41a. The record contains three audiotapes of Mr. Williams' statements on April 10, 1985. The first, labelled "Office" and marked No. 25 on the District Court docket sheet, records the interrogation which commenced immediately upon Mr. Williams' arrival in the police station. The second tape, labelled "Rights in Office" and marked No. 23, continues the interrogation (although there is an obvious gap between the first two tapes) and also includes the *Miranda* warnings and further interrogation following the warnings. The final tape from April 10th is labelled "Video" and marked No. 24. Notwithstanding the label of this third audiotape, no videotape exists of this or any other portion of the interrogation on April 10th. The record does contain a videotape of an interrogation conducted on April 12th, but that interrogation is not at issue, because all statements from April 12th were suppressed by the trial court.

the circumstances of the interrogation, he "was definitely in custody," and therefore entitled to *Miranda* warnings, by the time he was told "that he had a choice between answering his interrogators' questions and being formally charged and locked up" (Pet. App. 49a-50a):

> This choice did not leave petitioner free to go. It gave him a choice of surrendering his right to remain silent or being formally arrested. This was a significant deprivation of his freedom of action. A reasonable person in this position would have believed he was in custody at the time.

Finding that Williams made "several damaging admissions in response to unwarned, custodial police interrogation" between this time and the time *Miranda* warnings were finally given, the court held that Williams' Fifth Amendment rights had been violated by the introduction of these unwarned statements against him at trial (Pet. App. 49a-52a).

Next, because the prosecution had introduced in its case-in-chief evidence from *all* of the interrogation sessions conducted on April 10, 1985 – both before and after the *Miranda* warnings – the District Court was required to consider "whether petitioner's first, unwarned admissions tainted his subsequent, warned admissions" (Pet. App. 53a). Recognizing that " 'the ultimate issue of "voluntariness" is a legal question requiring independent federal determination' " (Pet. App. 54a-55a (*quoting Miller v. Fenton*, 474 U.S. 104, 110 (1985)), the court examined the circumstances relating to the subsequent statements under the framework set down in *Oregon v. Elstad*, 470 U.S. 298 (1985), and *Brady v. United States*, 397 U.S. 742 (1970). The court concluded that under the totality of the circumstances, Williams' post-*Miranda* statements made on April 10th could not be considered voluntary within the meaning of the Fourteenth Amendment. In the court's view, a principal factor favoring this conclusion was the fact that the interrogating officers repeatedly promised lenient treatment if Williams continued to talk. Thus, with respect to the second and third interrogation sessions on April 10th (*i.e.*, the two sessions following delivery of *Miranda* warnings), the District Court held (Pet. App. 70a-71a):

> In the present case, the police went far beyond mere exhortations to tell the truth. . . . Rather, after indicating several times that they were basically interested in knowing who the shooter was, the police promised petitioner that if he told them the truth about the crime he would not be charged. They made this promise to petitioner after acknowledging that they had witnesses who linked him to the murder weapon and stating that they believed they could prove he was at the murder scene. It was indeed, "quite unlikely" that petitioner would "walk" and not be charged at this time. Furthermore, this promise was made after having obtained unwarned admissions, thereby "exploit[ing] the unwarned admission to pressure [petitioner] into waiving his right to remain silent." *Elstad, supra*, at 316.

The court further held that, even if "harmless error analysis did apply to the admission of petitioner's inculpatory statements," it "could not find that admission of those statements was harmless" (Pet. App. 76a-77a).

Court of Appeals Proceedings

In her brief on appeal, Warden Withrow argued, first, that the District Court should not have considered any constitutional claim because Mr. Williams had "never raised any Federal issue at all relating to his confession in the State appellate courts" (App. Br. 5-6) – a point the warden had never made in the District Court and which her counsel later expressly abandoned at oral argument.[4] On the merits, the warden urged that no constitutional violation had occurred because: (a) Mr. Williams had not been in custody prior to having received *Miranda* warnings; and (b) his post-warnings statements were not motivated by promises of leniency and therefore were voluntary under *Oregon v. Elstad, supra*. The warden also argued that the District Court's ruling on

[4] See pp. 41-43 *infra*. An audio recording of the Sixth Circuit oral argument has been lodged with the Clerk of this Court.

voluntariness was unnecessary because no post-warning statements had been admitted at the trial. On this latter point, the warden simply misstated the facts: as both lower courts recognized, the State had made liberal use at trial of Mr. Williams' post-*Miranda* statements of April 10th. *See, e.g.*, J.A. 66a-73a; Trial Tr. Vol. II, at 38, 40-41.[5]

Warden Withrow expressed "trust" in the Court of Appeals' "superior scholarship" to correct the "colossal error" committed by the district judge (Br. App. 13-14, 9). The Sixth Circuit, however, unanimously affirmed the District Court's rulings. It held that the District Court had "correctly decided" that Robert Williams had been subjected to custodial interrogation before being read his *Miranda* rights, and it agreed that "an evaluation of 'the entire course of police conduct' " established that Williams' subsequent statements made in interrogation on April 10th were not voluntary because "[t]he officers' promises of leniency were intended to induce Williams' admissions" and his admissions "were conditioned on his belief that he would be released if he talked." *Williams v. Withrow*, 944 F.2d 284, 289 (6th Cir. 1991) (*quoting Oregon v. Elstad, supra*). The Court of Appeals recognized – notwithstanding confusion in the parties' arguments – that postwarnings statements of Mr. Williams *had* been used against him at trial, and in a fashion that could not be considered "harmless."

SUMMARY OF ARGUMENT

The District Court and a unanimous panel of the Sixth Circuit held that Robert Williams is entitled to habeas corpus

[5] The State's use at trial of Williams' post-warning custodial statements is recognized in the brief *amicus curiae* of the United States (U.S. Br. 4 n.3) and now appears to be acknowledged in the brief for the petitioner.

In the Court of Appeals (but *not* in the District Court), the State argued that the rule in *Stone v. Powell*, 428 U.S. 465 (1976), should be extended to *Miranda* claims. The state conceded that it "perceive[d] no legitimate basis for applying the rule in *Stone v. Powell* to cases involving the voluntariness of a confession" (App. Br. 15).

relief for two separate reasons: (1) custodial statements elicited by the police without administering any *Miranda* warnings were used against him as evidence of guilt at trial; and (2) subsequent custodial statements elicited from Mr. Williams by means which rendered them "involuntary" under the "totality of the circumstances" were also introduced as evidence of guilt at trial. Mr. Williams must be given a new trial unless both of those holdings are reversed.

The *Miranda* Holding

Warden Withrow does not contest in this Court the ruling by all four federal judges below that, under *Miranda v. Arizona*, 384 U.S. 436 (1966), Robert Williams is entitled to a new trial. Her sole argument with respect to *Miranda* is that under the principles announced in *Stone v. Powell*, 428 U.S. 465 (1976), this Court should bar federal courts from enforcing *Miranda* on habeas corpus if a state court has provided a "full and fair" hearing on the *Miranda* claim.

This Court has repeatedly rejected arguments that *Stone* should be extended beyond its Fourth Amendment origins, emphasizing that *Stone* was concerned solely with the proper scope of the deterrence-based remedy announced in *Mapp v. Ohio*, 367 U.S. 643 (1961). Until now, Justice Brennan's expressed fear that *Stone* would lead to erosion of the scope of federal habeas corpus has truly been the "misdirected" "hyperbole" that the *Stone* Court said it was. *See Stone*, 428 U.S., at 494 n.37.

None of the justifications perceived in *Stone* for barring Fourth Amendment exclusionary rule claims from habeas corpus applies to claims under *Miranda*. Unlike the rule announced in *Mapp*, the exclusionary aspect of *Miranda* actually *prevents* a constitutional violation from occurring. When police seize evidence in violation of the Fourth Amendment, the constitutional infraction is complete, and excluding the evidence at trial neither prevents, erases, nor exacerbates it; rather, the exclusion is merely intended to deter the police from committing *future* violations. In contrast, when the police compel custodial statements from suspects or elicit

such statements from them without a knowing and voluntary waiver of their rights, the privilege against compelled self-incrimination is not infringed unless and until those statements are introduced as proof of guilt at trial. That is why it can properly be said that the Fifth Amendment Self-Incrimination Clause – unlike the Fourth Amendment – itself contains an exclusionary rule.

Also unlike *Mapp*, the dictates of *Miranda promote* rather than undermine the truthfinding function and fairness of trials because the evidence excluded by *Miranda* cannot be presumed reliable. The *Stone* Court was concerned that applying the Fourth Amendment exclusionary rule "deflects the truthfinding process" and "afford[s]" a "windfall [to] guilty defendant[s]," because the evidence "can in no way have been rendered untrustworthy by means of its seizure." 428 U.S., at 490 (citation omitted). The calculus is completely reversed under *Miranda*, where only presumptively compelled, and thus potentially unreliable, evidence is excluded.

Extending *Stone* to *Miranda* claims also promises none of the practical benefits occasioned by *Stone*. *Stone* succeeded in removing virtually all Fourth Amendment claims from the purview of federal habeas corpus. But even if *Miranda* claims were barred from habeas, prisoners would continue to raise the same constitutional claims with respect to their custodial statements, without expressly invoking *Miranda*, by arguing that the statements were compelled or involuntary and thus their use directly violated the Fifth and Fourteenth Amendments. Adjudicating those claims will actually *increase* the burden on the federal courts and friction with state courts, since those claims require the court to examine the "totality of the circumstances" surrounding the statement. And the courts will still have to adjudicate *Miranda* issues, since the administration *vel non* of *Miranda* warnings is an important factor in the "totality of the circumstances" test.

Finally, the *ipso facto* assertion that the *Stone* doctrine should extend to *Miranda* claims because *Miranda* supposedly announced only "prophylactic rules" fails for several reasons. For one thing, *Stone* did not concern prophylactic rules at all, because *Mapp* announced only a doctrine of

general deterrence, not prophylaxis designed to prevent the defendant's constitutional right from being violated. Moreover, *Miranda* cannot be dismissed as "mere" prophylaxis, for that landmark case contained core constitutional holdings, and the prophylactic rules it also announced are fundamental to the guarantee of those rights. A new doctrine extending *Stone* to prophylactic rules needed to enforce constitutional rights would require re-examination of much of federal constitutional doctrine, with an anomalous result: separate bodies of federal constitutional doctrine, one for application by state courts and another for application by federal habeas corpus courts. Among other unwelcome consequences, this would subvert the recognized function of federal habeas corpus to ensure that state courts faithfully follow extant federal constitutional rules.

The Voluntariness Holding

There is no occasion for this Court even to review the merits of the lower courts' voluntariness holding, for all of the warden's arguments attacking that ruling have either been waived or manufactured by misrepresenting the record. The warden's brief argues, for example, that all Fifth Amendment claims, and indeed all constitutional claims, should be excluded from consideration on habeas corpus if there was a full and fair opportunity to litigate them in state court. *See* Pet. Br. 97-98 n.67. This extravagant argument is barred from consideration by Supreme Court Rule 14.1(a) because it was not raised in the Petition for Certiorari, which sought review only on the question of whether federal courts should hear *Miranda* claims on habeas corpus. Moreover, in the court below the warden argued precisely the *opposite* position – stating that she could "perceive[] no legitimate basis" for extending *Stone v. Powell* to voluntariness claims. App. Br. 15.

The warden's next argument – that Mr. Williams failed to exhaust his voluntariness claim – was expressly waived by her counsel in the Sixth Circuit. In the District Court, the warden suggested *no* procedural bars to considering the merits of Mr. Williams' *pro se* habeas petition. In her brief to

the Sixth Circuit, she reversed course and claimed that Mr. Williams had never raised *any* federal claim in the state courts. When questioned about "the exhaustion issue" at oral argument, counsel again reversed ground, inviting the court "to overlook that" because "I think I did not really raise that sufficiently in the District Court" and "I don't feel comfortable arguing that too forcefully." The Sixth Circuit relied on counsel's representations and affirmed the District Court on the merits. Only then did the State suggest a distinction between *Miranda* and the voluntariness issue, contending that only the former had been fully exhausted. That argument is merely a belated attempt to wriggle out of an unsuccessful strategic gamble. Allowing the warden to "unwaive" at this point would constitute blatant sandbagging of the Sixth Circuit, permitting the State improperly "to seek a favorable ruling on the merits in the [lower] court while holding the exhaustion defense in reserve for use on appeal." *Granberry v. Greer*, 481 U.S. 129, 132 (1987).

The warden's final attack on the voluntariness holdings below – that they constitute a "new rule" in violation of *Teague v. Lane*, 489 U.S. 288 (1989) – is plainly refuted by the careful opinions of both the District Court and the Sixth Circuit. The warden claims that both lower courts ruled that the statements elicited from Mr. Williams were *per se* involuntary under *Bram v. United States*, 168 U.S. 532 (1897), because they were induced by police promises of leniency. But this was not the ruling of either court. In fact, both courts pointedly rejected application of a *per se* rule and instead expressly applied the "totality of the circumstances" test outlined in *Oregon v. Elstad*, 470 U.S. 298 (1985), and *Miller v. Fenton*, 474 U.S. 104 (1985) – properly considering the repeated police promises and threats to be relevant factors within those "surrounding circumstances." The question posed in the Petition for Certiorari – whether a *per se* rule would violate *Teague* – is simply not presented by this case.

ARGUMENT

Both the District Court and the Sixth Circuit found two independent bases for granting the writ of habeas corpus to Robert Williams: the use against him at trial of (a) statements elicited in violation of *Miranda v. Arizona* and (b) post-warnings statements that were involuntary and hence inadmissible under the rationale of *Oregon v. Elstad*, 470 U.S. 298 (1985), *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), and *Culombe v. Connecticut*, 367 U.S. 568 (1961). The courts below held that neither error could be excused as harmless under *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991), and the warden has not challenged the lower courts' conclusions regarding harmless error either in her petition for certiorari or in her brief.[6] Thus, the judgment of the Sixth Circuit must be sustained unless the warden demonstrates legal grounds for rejecting the Court of Appeals' affirmance of *both* the District Court's ruling on *Miranda* and its holding that Williams' post-warning statements were involuntary.

As did the courts below, we address first the *Miranda* issue. It bears mention at the outset, however, that as to the voluntariness issue, which provides an independent ground for affirmance, *none* of the arguments the warden advances for reversal is properly presented. *See* pp. 12-13 *supra*. Indeed, the warden's treatment in her brief of the very questions she presented to the Court with respect to the voluntariness rulings below – discussing each only in a footnote – demonstrates their lack of substance and suggests that an appropriate disposition of this case may be dismissal of the writ.

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[6] In any event, because Williams' custodial statements provided the centerpiece of the prosecution's case, and because the trial judge expressly stated that they were critical to his verdict, the error in this case could not possibly be deemed "harmless" under any standard. *Cf. Brecht v. Abrahamson*, 60 U.S.L.W. 3849 (U.S., June 16, 1992) (granting certiorari to 944 F.2d 1363 (7th Cir. 1991)).

I. The Rule in *Stone v. Powell* Should Not Be Applied to Bar Respondent's Claim That His Conviction Was Secured by the State's Use, As Evidence of Guilt, of Custodial Statements Made Without Any of the Safeguards Required by *Miranda v. Arizona*.

The warden and her *amici* urge this Court to extend the rule announced in *Stone v. Powell* to bar consideration of Robert Williams' claim that his conviction was obtained by the use of custodial statements elicited from him by the police without administering any of the warnings, or other "adequate protective devices," required by *Miranda v. Arizona*. The argument for this unprecedented extension of *Stone* is that "like the Fourth Amendment's exclusionary rule, *Miranda* is a prophylactic rule that overprotects the Fifth Amendment interests it is designed to serve," and "as the concerns underlying Fourth Amendment claims on habeas are identical to those involving *Miranda* defects, a habeas court's treatment of the two claims should be the same" (Pet. Br. 91). Neither of those statements is true. There is no principled basis for applying *Stone v. Powell* to this case.

A. This Court Has Carefully Limited the Rule Announced in *Stone* to Claims Under the Fourth Amendment Exclusionary Rule.

In *Stone v. Powell*, this Court held that federal courts should not entertain a claim made by a state prisoner in a petition for a writ of habeas corpus that his conviction was based upon evidence obtained in violation of the Fourth Amendment, unless the state courts had denied him a "full and fair" opportunity to litigate this claim. 428 U.S., at 494. The Court made clear that its "decision [did] not mean that the federal court lacks jurisdiction over such a claim".[7] *Id.*, at

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[7] *Stone*, of course, could not have announced a jurisdictional rule because Congress, which establishes the jurisdiction of the inferior federal courts, has expressly provided that the federal courts "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *see id.* § 2241(b).

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495 n.37. Instead, *Stone* was predicated upon a conclusion that the *Mapp* exclusionary rule was not a "personal constitutional right" intended "to redress the injury" to the person affected ("for 'any [r]eparation comes too late' "), but rather was " 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect.' " *Id.*, at 486 (quoting *Linkletter v. Walker*, 381 U.S. 618, 637 (1965), and *United States v. Calandra*, 414 U.S. 338, 348 (1974)). Finding that the additional deterrent effect, "if any," of applying this exclusionary rule on collateral review was "minimal" and that the societal costs of the exclusionary rule were "substantial," 428 U.S., at 494-95, the Court concluded that "[i]n light of the nature and purpose of the Fourth Amendment exclusionary rule," "effectuation of the Fourth Amendment . . . [does not] require the granting of habeas corpus relief" when the rule is violated. *Id.*, at 481, 480. In other words, the judicially created deterrent remedy does not include resort to federal courts on habeas corpus, because on collateral review the "remedy" is ineffectual.

In deciding *Stone*, this Court "carefully limited the reach of its opinion." *Rose v. Mitchell*, 443 U.S. 545, 560 (1979). It expressly cautioned that its decision was "*not* concerned with the scope of the habeas corpus statute . . . generally," *Stone, supra*, at 495 n.37 (emphasis in original), but rather solely with a "judicially created" rule that was of "minimal utility . . . when sought to be applied to Fourth Amendment claims in a habeas corpus proceeding." *Id.* The Court was careful to emphasize that "Fourth Amendment violations are different in kind from denials of Fifth or Sixth Amendment

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The alternative arguments of both petitioner (Br. 92) and *amici* California *et al.* (Br. 8) that Miranda claims are not covered by § 2254(a) because *Miranda* is not a statute, but "judge-made" law, are frivolous. Even if *Miranda* claims *could* be analogized to Fourth Amendment suppression claims – a contention we address below – *Stone* itself demonstrates that jurisdiction exists to adjudicate such claims. If it did not, this Court could not have held that claims under *Mapp* could be adjudicated in federal habeas corpus proceedings where the prisoner did not have a "full and fair" hearing in the state courts. Similarly, in *Duckworth v. Eagan*, 492 U.S. 195, 201 n.3 (1989), this Court could not have declined Justice O'Connor's invitation to decide the question presented in this case if it were jurisdictional.

rights." *Id.*, at 479. When Justice Brennan expressed fear in his dissent that *Stone* might portend "substantial evisceration of federal habeas corpus jurisdiction," *id.*, at 503, the majority dismissed as "misdirected" the "hyperbole of the dissenting opinion," insisting that the opinion was based upon considerations unique to the Fourth Amendment exclusionary rule. *Id.*, at 49 n.37.

Since *Stone* was decided, this Court has declined every invitation to extend its reach beyond its Fourth Amendment origins. *See Jackson v. Virginia*, 443 U.S. 307 (1979) (claims of insufficiency of the evidence under *In re Winship*, 397 U.S. 358 (1970)); *Rose v. Mitchell*, 443 U.S. 545 (1979) (claims of racial discrimination in grand jury proceedings); *Kimmelman v. Morrison*, 477 U.S. 365 (1986) (claims of Sixth Amendment ineffective assistance of counsel).[8] And this Court has continued to adjudicate allegations of state-court *Miranda* violations in proceedings brought under 28 U.S.C. § 2254. *See, e.g., Berkemer v. McCarty*, 468 U.S. 420 (1984); *Duckworth v. Eagan*, 492 U.S. 195 (1989); *Moran v. Burbine*, 475 U.S. 412 (1986); *Wyrick v. Fields*, 459 U.S. 42 (1982).

B. None of the Considerations That Justified *Stone's* Limitation of the Remedy Encompassed by the Fourth Amendment Exclusionary Rule Warrants Barring *Miranda* Claims From Federal Habeas Corpus.

Three rationales justified the decision in *Stone:* first, that the *Mapp* exclusionary rule did not prevent or remedy the underlying constitutional violation; second, that violations of the Fourth Amendment do not affect the fairness or reliability of the trial; and third, that the marginal benefit, "if any," of extending the *Mapp* remedy to federal habeas proceedings was far outweighed by the burden collateral federal adjudication of those claims imposed upon the federal courts and federal-state comity. None of these rationales supports extending *Stone* to claims arising under *Miranda.*

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[8] *See also Brewer v. Williams*, 430 U.S. 387 (1977) (implicitly declining to apply *Stone* to Sixth Amendment claim); *Miller v. Fenton*, 474 U.S. 104 (1985) (implicitly declining to extend *Stone* to inquiries into the voluntariness of confessions); *Cardwell v. Taylor*, 461 U.S. 571 (1983) (*dicta* to same effect).

1. Unlike *Mapp, Miranda* Does Not Merely Deter Police Misconduct: It Actually Does "'Redress the Injury' to the Person Affected."

It is precisely because *Miranda's* exclusionary rule, unlike the exclusionary rule announced in *Mapp, does* prevent defendants' constitutional rights from being violated, that the considerations which underlie this Court's decision in *Stone* do not favor eliminating habeas review of *Miranda* claims.

The Fourth Amendment protects a right to privacy – the right of an individual to be free from unreasonable searches and seizures. *See Boyd v. United States,* 116 U.S. 616, 630 (1886); *Mapp v. Ohio, supra,* at 646-47; *Stone v. Powell, supra,* at 482. This right, fundamental as it is, is not necessarily connected with a criminal trial. A person subjected to an unreasonable search and seizure often is not charged with any crime; if he is, he may never be tried. Yet his constitutional rights have been violated. Indeed, even if a trial does subsequently take place, nothing that occurs during that trial can alter the Fourth Amendment violation in any way. The Fourth Amendment violation is complete at the time of the invasion of privacy. There is no additional invasion of privacy wrought by admission of the illegally-seized evidence.

For this reason, suppression of materials seized in violation of the Fourth Amendment cannot serve to cure the prior invasion of privacy or any other right protected by the Fourth Amendment. Suppression may serve other purposes – principally, deterrence against future unreasonable searches and seizures by police against other persons. But because suppression of evidence cannot undo an invasion of privacy, it cannot be justified on remedial grounds, for as this Court has pointed out, "[r]eparation comes too late." *Linkletter v. Walker,* 381 U.S. 618, 637 (1965) (quoted in *Stone, supra,* at 486). This is the meaning of *Stone's* teaching that *Mapp* did not establish a "personal constitutional right," but rather simply a measure aimed at general deterrence of future police misconduct. As Justice Powell, the author of *Stone,* later explained in *Kimmelman v. Morrison, supra,* 477 U.S., at 392 (concurring opinion): "[W]e reasoned in *Stone* that the exclusionary rule

does not exist to remedy any wrong committed against the defendant, but rather to deter violations of the Fourth Amendment by law enforcement personnel."

Miranda is utterly different. The Self-Incrimination Clause of the Fifth Amendment protects a defendant from being compelled in a criminal trial to be a witness against himself. It provides a defendant an absolute constitutional right to refuse to incriminate himself at trial with his own words and to bar the government from introducing in its case-in-chief any statement made under custodial police interrogation which was not "truly the product of his free will."

The Self-Incrimination Clause, in other words, provides a *trial* right. Even where the police extract statements from a suspect in custody without administering *Miranda* warnings, and even where the stationhouse statements are prompted by force or palpable coercion, there is no violation of the Self-Incrimination Clause unless and until the statements are admitted at trial as part of the prosecution's case-in-chief. The constitutional provision that "[n]o person shall be compelled in any criminal case to be a witness against himself" does not protect an individual from being "compelled" to speak or testify prior to trial – only from the subsequent introduction of such statements as evidence of guilt at trial. *See, e.g., Kastigar v. United States,* 406 U.S. 441 (1972); *Murphy v. Waterfront Commission,* 378 U.S. 52, 100, 107 (1964) (White, J., concurring). It is not simply the gathering, but the *use* of the evidence that violates the Self-Incrimination Clause.

Thus, in stark contrast to a Fourth Amendment violation, which occurs whether or not a prosecution ever ensues and which cannot be remedied by suppression at trial, a violation of the Self-Incrimination Clause can be completely prevented by suppression of stationhouse statements taken in violation of *Miranda.* The link between the remedy (exclusion of evidence at trial) and the constitutional violation is not simply *stronger* in the *Miranda* context than in the context of the Fourth Amendment exclusionary rule: in the Self-Incrimination context, the remedy actually *prevents* the constitutional violation. That is why it can properly be said that the Self-

Incrimination Clause itself contains an exclusionary rule. *See Duckworth v. Eagan, supra*, 492 U.S., at 209 (O'Connor, J., concurring) ("The suppression remedy is quite possibly contained within the guarantee of the Fifth Amendment itself.").

To be sure, suppression of custodial statements taken in violation of *Miranda* may also serve purposes of general deterrence. *See, e.g., Michigan v. Tucker*, 417 U.S. 433, 446-47 (1974).[9] The constitutional imperative of *Miranda*, however, is not deterrence. It is the *prevention* of a violation of the defendant's own constitutional right at his trial. That is the critical, and huge, difference between *Miranda* and *Mapp*.

2. Unlike the Fourth Amendment Exclusionary Rule, *Miranda* Rights Are Fundamentally Linked to Considerations of Fairness and Reliability at Trial.

The Court in *Stone* was also persuaded to exclude *Mapp* claims from federal habeas corpus because *Mapp* caused the exclusion of highly reliable evidence. Quoting Justice Black's dissent in *Kaufman v. United States*, 394 U.S. 217, 237 (1969), the Court found that evidence seized in violation of the Fourth Amendment "can in no way have been rendered untrustworthy by the means of its seizure." *Stone, supra*, at 490. Application of *Mapp* therefore "deflects the truthfinding process" and "afford[s]" a "windfall [to] guilty defendant[s]." *Id.*, at 490.

Unlike physical evidence seized in violation of the Fourth Amendment, however, a custodial statement taken from a suspect in violation of *Miranda* is presumptively

[9] In addition, *Miranda* "provided police with concrete guidelines, promoting self-regulation and reasonably ensuring the admissibility of confessions when its dictates are followed. *Miranda* also gave lower courts easily applicable rules and obviated in many instances the case-by-case analysis previously utilized to resolve challenges to confessions." *White v. Finkbeiner*, 687 F.2d 885, 893 n.21 (7th Cir. 1982), *vacated on other grounds*, 465 U.S. 1075 (1984). In contrast, "[n]o such benefits accompanied *Mapp*, which contained only a remedial component and did nothing to clarify the general prohibition against unreasonable searches and seizures." *Id.*

*un*reliable. When *Miranda* violations are raised in federal habeas corpus proceedings, "the integrity of the factfinding process" of the state trial court is called into question. *Brewer v. Williams*, 430 U.S. 387, 414 (1977) (Powell, J., concurring). *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 240, 241 (1973) (stating that the "basis of [*Miranda*] was the need to protect the fairness of the trial itself" and that there is a "vast difference" between rights under the Fourth Amendment and rights, like those expressed in *Miranda*, that "protect a fair criminal trial"); *White v. Finkbeiner, supra*, 687 F.2d at 894 ("*Miranda* claims cannot fairly be characterized as entirely non-guilt-related."). Indeed, this Court has recognized that the unreliability of statements obtained in violation of *Miranda* is an important justification for the decision in that case. In *Johnson v. New Jersey*, the Court noted that "*Miranda* guard[s] against the possibility of *unreliable statements* in every instance of in-custody interrogation. . . . *Miranda* provide[s] important new safeguards against the use of *unreliable statements* at trial." 384 U.S., at 730 (emphasis added).[10]

[10] Similarly, the Court has noted that " 'a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be *less reliable* and more subject to abuses' than a system relying on independent investigation"; thus, "protection of the courts from reliance on untrustworthy evidence" is an important justification for the Fifth Amendment exclusionary rule. *Michigan v. Tucker, supra*, 417 U.S. at 448 & n.23 (quoting *Escobedo v. Illinois*, 378 U.S. 478, 488-89 (1964) (emphasis added)).

None of this Court's decisions delimiting the scope of *Miranda* undermine this tie between *Miranda* and reliability. In *Oregon v. Hass*, 420 U.S. 714 (1975), which permitted use of statements obtained in violation of *Miranda* to impeach a testifying defendant, the Court made clear that it was doing so to ensure that *Miranda* would not be used to frustrate, rather than to achieve, its own aims of reliability. *Oregon v. Elstad*, 470 U.S. 298 (1985), and *Michigan v. Tucker*, 417 U.S. 433 (1974), held simply that the Constitution does not require the exclusion of reliable evidence obtained after *Miranda* warnings were given, provided it was not obtained involuntarily; thus, those cases serve to reinforce the notion that reliability is a foundation underlying *Miranda*. The Court's focus on the importance of *Miranda* warnings to insure reliability is confirmed by its consistent refusal to allow the unwarned confessions in *any* of these cases to be admitted into evidence as direct evidence of guilt. Indeed, with the exception of *New York v. Quarles*, 467 U.S. 649 (1984), which established a *sui generis* "public safety" exception, this Court has never upheld the admission, as direct evidence of guilt, of a custodial statement obtained in the complete absence of *Miranda* warnings.

In fact, *Miranda* arose as a direct effort to introduce trustworthiness into a process that had long been decried as burdensome and unreliable. Before *Miranda*, trial courts excluded statements made to the police when they found the statements to be involuntary, *see, e.g., Chambers v. Florida*, 309 U.S. 227 (1940) – a determination that often required vexing and time-consuming *ad hoc* inquiries into the facts of each case. Because typically only the suspect and the police officers were present in the interrogation room, *see Miranda, supra*, at 445, the resulting hearings often degenerated into credibility contests in which the suspects alleged coercion and the officers denied it. Trial courts had difficulty making reliable factual determinations and thus determining the voluntariness of the statement. *See, e.g.*, Note, *Developments in the Law – Confessions*, 79 Harv. L. Rev. 935, 983-84 (1966); Y. Kamisar, *Police Interrogation and Confessions* 73-75 (1980); Schulhofer, *Confessions and the Court*, 79 Mich. L. Rev. 865, 871 (1981). In this context, the bright-line *Miranda* rules, with their specified warnings, waiver requirements, and allocation of the burdens of proof, improved the ability of courts to make reliable, constitutionally significant judgments regarding the admissibility of testimonial evidence.

Thus, whereas in the name of protecting privacy interests unrelated to the criminal process, *Mapp* concedely frustrates the pursuit of truth by depriving the trial court of tangible, reliable evidence of the defendant's factual guilt, *see Stone v. Powell, supra*, at 490, the exclusion of statements under *Miranda* – because they are presumptively *in*voluntary and *un*reliable – enhances the system's ability to arrive at the truth through trustworthy and fair means.

This is especially true when, as in the case at bar, the alleged violation is no mere "technical" violation of *Miranda*, in which the challenge is directed to the precise phrasing of the *Miranda* warnings. *Cf. Duckworth v. Eagan, supra; Michigan v. Tucker, supra*. The officers interrogating Robert Williams administered *no Miranda* warnings whatsoever. They took no steps at all to ascertain that his self-incriminatory statements reflected a knowing and voluntary waiver of his right to remain silent and his right to counsel. They were fully

aware of their failure to do so and continued in their unwarned interrogation even after discussing it between themselves. During the course of his interrogation on April 10th, Williams was persistently exhorted to alter and expand upon his prior statements by admonitions that he was still not telling the truth and that he could only avoid being charged if the officers believed him. This is precisely the type of situation in which the reliability concerns articulated in *Miranda* are particularly acute. It is far indeed from the Fourth Amendment claims at issue in *Stone*, in which clearly reliable physical evidence was excluded to protect interests unrelated to the criminal process.[11]

3. Eliminating *Miranda* Claims from Federal Habeas Corpus Would Neither Decrease the Burden on Federal Courts Nor Ameliorate Federal-State Friction.

In *Stone*, this Court envisioned utilitarian benefits from the exclusion of *Mapp* claims from federal habeas scrutiny:

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[11] The important difference between *Miranda* and *Mapp* in this regard is well illustrated by comparing the facts in *Stone* with those in this case. *Stone* involved two cases: in one, the evidence to be excluded was obtained as a result of an arrest pursuant to a statute that was later determined to be unconstitutionally vague (*see* 428 U.S., at 471); in the other, the evidence was obtained with a warrant that was later declared to be invalid under *Spinelli v. United States*, 393 U.S. 410 (1969), and *Aguilar v. Texas*, 378 U.S. 108 (1964) (*see* 428 U.S., at 473). These technical violations are a far cry from the officers' studied decision in this case not to provide Robert Williams with *Miranda* warnings even after telling him in a stationhouse interrogation that he could either tell the truth or be locked up.

In any event, this Court has demonstrated that the effect of a constitutional violation on guilt or innocence in a particular case is not dispositive of requests to extend *Stone*. In *Rose v. Mitchell, supra*, for example, the court refused to extend *Stone* to alleged violations of the Equal Protection Clause in the selection of a grand jury foreman, even when the defendant had subsequently been convicted by a properly selected jury and the reliability of the guilt determination was not challenged. Similarly, in *Kimmelman v. Morrison, supra*, the Court refused to extend *Stone* to Sixth Amendment ineffective assistance claims, although the Court clearly believed the evidence admitted at trial had been reliable and probative. Even though the particular ineffectiveness claim in *Kimmelman* did not call into question the reliability of the defendant's conviction, members of the Court recognized that others might. *See, e.g.*, 477 U.S., at 393 (Powell, J., concurring).

> (i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded.

Stone, supra, at 491 n.31 (quoting *Schneckloth v. Bustamonte, supra,* 412 U.S., at 259 (Powell, J. concurring)). The importance of limiting the burdens on federal courts and minimizing friction with state courts is underscored in virtually all of this Court's recent decisions limiting the scope of federal habeas review of claims by state prisoners. *See, e.g., Keeney v. Tamayo-Reyes,* 60 U.S.L.W. 4339, 4341 (U.S., May 4, 1992); *McCleskey v. Zant,* 111 S. Ct. 1454, 1469 (1991); *Coleman v. Thompson,* 111 S. Ct. 2546, 2559 (1991). Extension of the rule in *Stone* to *Miranda* claims, however, would very likely *increase* both the burdens on federal courts and the friction that attends federalism.

By removing claims under *Mapp* from federal habeas corpus, *Stone* effectively freed federal-court dockets from all collateral claims concerning the admission of physical evidence. Only egregious practices can support a due process claim concerning the production of physical evidence, *see, e.g., Rochin v. California,* 342 U.S. 165 (1952), and petitions raising these claims are both rare and easily screened.

Removing *Miranda* violations as a basis for federal habeas relief is likely to produce the opposite result. If *Miranda* claims are not considered, prisoners will seek to vindicate their rights by claiming, without reference to *Miranda,* that the statements admitted against them were compelled or involuntary and thus directly violative of the Fifth and/or Fourteenth Amendments. Unless this Court is prepared to reverse *Miller v. Fenton, supra,* and the entire jurisprudence upon which it is based – a course the Court expressly declined in *Wright v. West,* 60 U.S.L.W. 4369 (U.S., June 19, 1992) – claims raised by state prisoners in federal habeas petitions alleging that a statement introduced at trial had been compelled or induced involuntarily will be adjudicated in federal court, and under a *de novo* standard of "independent federal determination."

See Miller v. Fenton, supra, 474 U.S., at 110; *Wright v. West, supra,* 60 U.S.L.W., at 4644 (O'Connor, J., concurring), 4647 (Kennedy, J., concurring). Moreover, involuntariness must be determined by reference to the "totality of the circumstances" – a test that requires federal courts to inquire into the circumstances of the interrogation and to examine the precautions taken to avoid compulsion. *See Arizona v. Fulminante,* 111 S. Ct. 1246, 1252 (1991); *cf. Schneckloth v. Bustamonte, supra,* 412 U.S., at 227.

The replacement of *Miranda* claims – which typically are adjudicated easily under "bright-line" rules, *see, e.g., California v. Prysock,* 453 U.S. 355, 359 (1981) – with "direct" Fifth or Fourteenth Amendment claims that a confession was obtained involuntarily or absent a knowing and voluntary waiver of a suspect's rights will almost certainly increase the burden on federal courts and the friction between the federal and state courts. Not only do determinations of "voluntariness" and knowing and voluntary waivers – which must be adjudicated *de novo* in light of the "totality of the circumstances" – require considerably more time and effort than application of *Miranda,* but the very *nature* of these inquiries requires federal courts to scrutinize the entire record relating to the interrogation in question, and under a standard which is inherently ambiguous. Even ardent critics of *Miranda* have characterized the voluntariness standard as "a test which ma[kes] everything relevant and nothing determinative." Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy,* 80 Nw. U.L. Rev. 100, 108-09 (1985) (citations omitted). The shift of focus from *Miranda* to direct Fifth or Fourteenth Amendment claims will almost certainly tend to impede reliance on state court findings of fact, *see, e.g., Taylor v. Cardwell,* 579 F.2d 1380, 1382 (9th Cir. 1978), by requiring resort to a standard of law that is necessarily more subjective and *ad hoc* than application of a bright-line standard, *see, e.g., Minnick v. Mississippi,* 111 S. Ct. 486, 489-91 (1990).[12]

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[12] *See also, e.g., Haley v. Ohio,* 332 U.S. 596, 602 (1948) (opinion of Frankfurter, J.) (describing the criteria of Due Process voluntariness as "[s]ubtle

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As a practical matter, extension of *Stone* to *Miranda* claims would not even remove *Miranda* issues from most cases: a federal court considering Fifth and Fourteenth Amendment claims in a habeas petition still would have to determine whether the petitioner had been warned of his rights, because such warnings are an important factor in analysis of the totality of the circumstances and bear directly on whether a defendant knowingly and voluntarily waived his rights.[13] *See Haynes v. Washington*, 373 U.S. 503, 516-17 (1963); Note, *supra*, 79 Harv. L. Rev., at 981 n.219.

C. That *Miranda* Announced "Prophylactic Rules" Necessary to Protect the Fifth Amendment Provides No Justification for Removing *Miranda* Claims From Federal Habeas Corpus.

The remaining assertion made by the warden and her *amici* relies *ipso facto* on the observation that *Miranda*

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and even elusive"); *Reck v. Pate*, 367 U.S. 433, 455 (1961) (Clark, J., dissenting) (describing the "elusive measureless standard of psychological coercion"); *New York v. Quarles*, *supra*, 467 U.S., at 663-64 (O'Connor, J., concurring in part and dissenting in part) (noting that one of the "core virtue[s]" of *Miranda* is its clarity for courts); Monaghan, *The Supreme Court, 1974 Term Foreword – Constitutional Common Law*, 89 Harv. L. Rev. 1, 22 & n.114 (1975) ("That the *Miranda* prophylactic rule approach is 'better' than the burdensome task of normal case-by-case adjudication may be conceded.").

[13] *See* Schulhofer, *Confessions and the Court*, 79 Mich. L. Rev. 865, 891 (1981). As Professor Schulhofer also points out (*id.*, at n.119):

> Moreover, if warnings were not given, or given and not respected, a habeas court applying a voluntariness analysis normally would even have to decide whether there was "custody" and "interrogation" *within the meaning of Miranda*, because the failure of the police to respect legal requirements is again recognized as an important factor in the totality of the circumstances. *See, e.g., Haynes v. Washington*, 373 U.S. 503, 510 n.7 (1963); *Spano v. New York*, 360 U.S. 315, 320-21 (1959).

announced a "prophylactic rule." As the warden and the Solicitor General would have it, merely because *Miranda* announced a "prophylactic rule" (Pet. Br. 91), which is a "judicially fashioned mechanism designed 'to create institutional respect for Fifth Amendment values' " (U.S. Br. 14), therefore *Stone* dictates that federal courts should abstain from enforcing it. This assertion, however, fundamentally misconceives the holdings in both *Miranda* and *Stone*. *Miranda* is not simply a case about "mechanisms" and "institutional respect"; *Stone* did not decide anything at all about "prophylactic rules"; and the very test advocated by the warden's *amici* for adjudication of confession-related claims in federal habeas proceedings – the due process "voluntariness" test – *itself* incorporates prophylactic rules. Were this Court to announce a doctrine that "prophylactic" constitutional rules will not be enforced in federal habeas proceedings, federal courts would be required to revisit and reinterpret large bodies of constitutional doctrine, with an anomalous and unjustifiable result: separate federal and state standards for the enforcement of federal constitutional rights.

1. *Miranda's* Prophylactic Rules Are Bound to Its Core Constitutional Holdings.

It is now common to regard *Miranda v. Arizona* as having announced "prophylactic rules." But what, precisely, does this mean? *Miranda* is unquestionably a landmark case about constitutional rights under the Self-Incrimination Clause of the Fifth Amendment. In *Miranda*, this Court held for the first time that the Self-Incrimination Clause was applicable to custodial police interrogations and that statements elicited by custodial interrogation might be inadmissible under that clause even if they could not be deemed "revolting to the sense of justice," *Brown v. Mississippi*, 297 U.S. 278, 286 (1936).[14] The privilege against compelled self-incrimination,

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[14] *See Michigan v. Tucker*, *supra*, 417 U.S. at 443 ("Thus the Court in *Miranda*, for the first time, expressly declared that the Self-Incrimination Clause

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Miranda held, "is fulfilled only when the person [in custody] is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will." 384 U.S., at 460 (citation omitted).

Miranda further held that custodial surroundings are inherently fraught with compulsion, and therefore "protective devices" are necessary to ensure that any custodial statements given in the absence of counsel are truly made upon free will. "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings," the Court held, "no statement obtained from a defendant can truly be the product of his free choice." *Id.*, at 458. The Court went on to discuss *what* protective devices would suffice to "appris[e] accused persons of their right of silence and . . . assur[e] a continuous opportunity to exercise it," *id.*, at 467, leaving the actual choice of procedures to legislatures and police agencies. Finally, the Court held, "[i]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id.*, at 475.

Over time, *Miranda* has come to be understood as having announced both core requirements of the Fifth Amendment privilege against compelled self-incrimination and certain "prophylactic rules" necessary to guarantee the privilege itself. On the "core" side, *Miranda* plainly holds that a suspect in police custody has a Fifth Amendment right to remain silent and a correlative right to exclude as direct evidence of guilt any statement made by him during custodial interrogation, unless the statement was the result of a *knowing and voluntary* waiver of his right to remain silent at the stationhouse. *See, e.g., Michigan v. Tucker, supra*, 417 U.S., at 443.

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was applicable to state interrogations at a police station, and that a defendant's statements might be excluded at trial despite their voluntary character under traditional principles."); *Michigan v. Mosley*, 423 U.S. 96, 100 (1975).

On the "prophylactic" side, it is clear that the precise warnings specified in *Miranda* are not a " 'constitutional straitjacket' " but rather "provide practical reinforcement for the right against compulsory self-incrimination." *Michigan v. Tucker, supra*, at 444 (quoting *Miranda*). Indeed, *Miranda* itself stated expressly that the Constitution does not mandate any "specific code of procedures" for protecting the Fifth Amendment privilege against compelled self-incrimination. The Court indicated that procedures other than the warnings set forth in its opinion would satisfy the constitutional mandate so long as they are "fully as effective" as the Court's own. *Miranda, supra*, at 490.

The intermediate holding of *Miranda* – that because police custody is an inherently coercive setting, "adequate procedural devices" are required before any custodial statement can be considered the "product of free choice" – is not readily categorized as either "core" or "prophylactic." On the one hand, *Miranda* itself held that in the absence of "fully effective" alternative safeguards, "[t]he requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." 384 U.S., at 476. Three years later, this Court reaffirmed that "use of [custodial] admissions obtained in the absence of the required warnings [is] a flat violation of the Self Incrimination Clause of the Fifth Amendment as construed in *Miranda*." *Orozco v. Texas*, 394 U.S. 324, 326 (1969). And as Justice O'Connor has explained: *Miranda* "held *unconstitutional*, because inherently compelled, the admission of statements derived from incustody questioning not preceded by an explanation of the privilege against self-incrimination and the consequences of forgoing it." *New York v. Quarles, supra*, 467 U.S., at 660 (concurring in part and dissenting in part) (emphasis added). *See generally* Monaghan, *supra*, 89 Harv. L. Rev., at 42 n.217 (1975) ("*Miranda* thus holds that 'adequate' safeguards are constitutionally required.").

On the other hand, the requirement of "adequate protective devices" is based upon a *presumption* that custodial

interrogations are inherently coercive. Because in some instances a suspect's unwarned custodial statements may, in fact, "truly be the product of his free choice," 384 U.S., at 458, it can be said that *Miranda* "sweeps more broadly than the Fifth Amendment itself," *Oregon v. Elstad*, 470 U.S. 298, 306 (1985), and announces a prophylactic rule. That, presumably, is the meaning of the observation in *Elstad, supra*, at 307 n.1, that "[a] *Miranda* violation does not *constitute* coercion but rather affords a bright-line legal presumption of coercion, requiring suppression of all unwarned statements."

Prophylaxis or not, *Miranda*'s exclusion of unwarned custodial statements is intimately tied to the privilege against compelled self-incrimination. As the Court reaffirmed in *Moran v. Burbine*, 475 U.S. 412, 420 (1986):

> In *Miranda v. Arizona*, the Court recognized that custodial interrogations, by their very nature, generate "compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." 384 U.S., at 467.

Similarly, in *Miller v. Fenton*, the Court recognized the special need for independent federal review of claims involving the taking of a confession. Although *Miller v. Fenton* was limited on its facts to a due process challenge (since the defendant in that case – unlike Robert Williams – had been advised of his *Miranda* rights as soon as he was brought to the police station), the Court's analysis applies with equal force in the context of *Miranda* claims (474 U.S., at 117-18):

> [T]he critical events surrounding the taking of a confession almost invariably occur in a secret and inherently more coercive environment. *Miranda v. Arizona*, 384 U.S., at 458. These circumstances . . . elevate the risk that erroneous resolution of the voluntariness question might inadvertently frustrate the protection of the federal right. . . . We note . . . that in the confession context, independent federal review has traditionally played an important parallel role in protecting the rights at stake when the prosecution secures a conviction through the defendant's own admissions.

It bears emphasizing that *Miranda*'s prophylactic rules are based squarely on the principles that "[t]his Court has always set high standards of proof for the waiver of constitutional rights" and that because "the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given (and of the waiver of Fifth Amendment rights) during incommunicado interrogation, the burden is rightly on its shoulders." *Miranda, supra*, 384 U.S. at 475.

2. *Stone* Provides No Justification for Excluding Violations of Prophylactic Rules Like Those Announced in *Miranda*.

Wherever the line between "core" rights and prophylaxis is drawn, the fact that *Miranda* announces prophylactic rules to protect the Fifth Amendment does *not* supply a reason to subject *Miranda* claims to the rule in *Stone*. In fact, a habeas exception for prophylactic rules was not even an issue in *Stone*, because the Fourth Amendment doctrine announced in *Mapp v. Ohio, supra*, does not apply a prophylactic rule.

A prophylactic rule is one designed to prevent a current constitutional violation (or other violation of law) from occurring. Such rules, which are pervasive in constitutional jurisprudence,[15] frequently take the form of conclusive presumptions and are based upon two premises: first, that "application of [the] presumption . . . reach[es] the correct result most of the time," *Coleman v. Thompson*, 111 S. Ct. 2546, 2548 (1991); and second, that uncertainties and difficulties in proof make it difficult to separate violations from nonviolations, *see, e.g., Miranda, supra*, at 448. Failure to create a

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[15] Examples of prophylactic rules imbedded in constitutional jurisprudence even outside of criminal procedure are discussed in, *e.g.*, Monaghan, *supra*, 89 Harv. L. Rev., at 18-26; Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435, 448-49 (1987).

bright-line presumption would therefore result in constitutional violations in an unacceptable number of cases.

By requiring suppression of custodial statements made in the absence of warnings or other "adequate protective devices," *Miranda* announces such a prophylactic rule. *Mapp v. Ohio*, however, does not. The Fourth Amendment exclusionary rule cannot possibly – and does not even purport to – prevent any violation of the defendant's Fourth Amendment rights from occurring, for in every instance the violation has already occurred.[16] Instead, the exclusionary rule announced in *Mapp* provides only a forward-looking deterrent remedy designed to " 'exert general legal pressures to secure obedience to the Fourth Amendment on the part of . . . law-enforcing officers' " in the future. *Stone v. Powell, supra*, at 465 n.24 (quoting Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 388-89 (1964)). Thus, any argument based upon the "prophylactic" nature of *Mapp* is unconvincing and misleading.

Indeed, ironically, the very standard to which the warden's *amici* would have federal courts return – whether a confession was ufficiently "voluntary" to satisfy due process – itself incorporates prophylactic rules. This Court has held, for example, that the infliction of unexplained physical brutality on a suspect in police custody renders any subsequent statement *per se* involuntary. *See, e.g., Sims v. Georgia*, 389 U.S. 404 (1967); *Stein v. New York*, 346 U.S. 156, 182 (1953) (opinion by Jackson, J.) (When "[p]hysical violence or [the] threat of it" is "present, there is no need to weigh or measure its affects on the will of the individual victim."); *Fikes v. Alabama*, 352 U.S. 191, 198 (1957) (Frankfurter, J., concurring) ("It is, I assume, common ground that if this record had disclosed . . . one truncheon blow on the head of petitioner a confession following such a blow would be inadmissible because of the Due Process Clause."). In *Miller v. Fenton*, Justice O'Connor reflected the "consistently held view" that even under the Fourteenth Amendment "voluntariness" standard, "the admissibility of a confession turns as much on

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[16] *See* discussion *supra* pp. 18-19.

whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne." 474 U.S., at 116 (emphasis in original).[17]

If there is any basis for applying *Stone* to *Miranda* claims, then, it is *not* because *Miranda* includes prophylactic rules. Indeed, so long as a prophylactic rule protecting a constitutional right is valid, a person convicted in violation of that rule is plainly in custody in violation of either the "Constitution" or the "laws" of the United States. *See* 28 U.S.C. § 2254(a). Were this not the case, the dozens, perhaps hundreds, of cases in which this Court has applied constitutional prophylactic rules to the states were wrongly decided.

It is therefore highly questionable whether federal courts even have the power to decline claims raised by state prisoners on habeas corpus that they are in custody in violation of a prophylactic rule that, according to this Court, is mandated by the Constitution. Even if such power exists, however, this Court should carefully consider the mischievous consequences of adopting the suggestion that *Miranda* should not be enforced in federal habeas corpus proceedings (except in the rare instance in which the petitioner was denied a "full and fair" hearing in the state court) on the ground, *ipso facto*, that *Miranda* applies prophylactic rules.

If *Stone* were applied to all "prophylactic rules" – rules which, like *Miranda*, respond to "the context of the criminal processes maintained by the American States" (*Duncan v. Louisiana*, 391 U.S. 145, 150 n.14 (1968)) by establishing conclusive presumptions or altering burdens of persuasion in the fact-finding process necessary for the enforcement of federal constitutional rights – then this Court and the lower federal courts would be required to revisit not only the entire body

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[17] Moreover, the warden's argument based on the prophylactic nature of *Miranda* overlooks the fact that this Court has already declined to extend *Stone* to the admittedly "prophylactic" rule at issue in *Brewer v. Williams*, 430 U.S. 387 (1977).

of doctrine developed to adjudicate the voluntariness of confessions, but indeed much of federal constitutional doctrine in order to disentangle what is "prophylactic" from what is "nonprophylactic."

Such a rule would require courts to decide, for example, whether the burdens placed on the State when a suspect is physically abused in custody (*Sims v. Georgia, supra*) or is subjected to mind-altering drugs (*Beecher v. Alabama*, 408 U.S. 234 (1979); *Riggins v. Nevada*, 112 S. Ct. 1810 (1992)) are "necessary" constitutional cures or only "prophylaxes." Similarly, courts would be required to reexamine whether the burdens shifted by the "prima facie" evidence rules of, *e.g.*, *Avery v. Georgia*, 345 U.S. 559 (1953), *Castenada v. Partida*, 430 U.S. 482 (1977), and *Batson v. Kentucky*, 476 U.S. 79 (1986); or the rules preventing violations of the Confrontation Clause announced in *Bruton v. United States*, 391 U.S. 123 (1968), and *Cruz v. New York*, 481 U.S. 186 (1987); or the procedures for competency determinations (and the proscriptions against retroactive determinations) of *Pate v. Robinson*, 383 U.S. 375 (1966), and *Drope v. Missouri*, 420 U.S. 162 (1975); or the rules to prevent violations of the due process proscription of vindictive sentencing or prosecution stated in *North Carolina v. Pearce*, 395 U.S. 711 (1969), and *Blackledge v. Perry*, 417 U.S. 21 (1974), are "core" constitutional mandates or prophylaxes to prevent constitutional violations.

That analysis would be a burdensome and convoluted route to an irrational result: two bodies of doctrine governing many federal constitutional rights, one for application by state courts and another for application by federal habeas corpus courts. Such a result would also directly undermine a principal function of federal habeas corpus – to ensure that state courts faithfully follow extant federal constitutional rules, *see, e.g., Teague v. Lane, supra*, 489 U.S., at 306-07.[18]

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[18] The crucial incentive federal habeas corpus creates for state courts to adhere faithfully to uniform federal standards has been stressed even by those members of this Court most concerned about the costs of collateral federal review. As Justice Powell stated, concurring in *Solem v. Stumes*, 465 U.S. 638, 653

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D. No Other Basis Exists to Decline Review of *Miranda* Claims Brought under 28 U.S.C. § 2254.

The sole question Warden Withrow presented to this Court with respect to the *Miranda* rulings of the lower courts is whether *Stone v. Powell* should be extended to bar collateral review. Nonetheless, she has devoted over seventy pages of her brief to an exegesis on the supposed "History of the Writ," dating from the thirteenth century, apparently in support of her contention that this Court's perversion of the writ of habeas corpus "has transformed the writ into a juridical Frankenstein monster, which is threatening to turn upon the Society which created it" (Pet. Br. 83). To the extent the warden contends that federal courts may, and should, decline to consider *Miranda* claims raised under 28 U.S.C. § 2254(a) for reasons other than those stated in *Stone v. Powell*, the question has neither properly been presented to this Court nor accepted by it for review.

In any event, the warden's historical claims are easily answered. Congress, which alone demarks the habeas jurisdiction of the federal courts, has provided unequivocally that federal courts "*shall* entertain" an application for a writ of habeas corpus by a state prisoner "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (emphasis added); *see also id.* § 2241(b)(3). Whether *Miranda* announced "core" requirements of the Fifth Amendment privilege against compelled self-incrimination or "prophylactic" rules designed to protect that privilege, its holding is nonetheless federal law,

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(1984), the function of "[r]eview on habeas [is] to determine that the conviction rests upon correct application of the law in effect at the time of the conviction." *See also, e.g., Desist v. United States*, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting); *Penry v. Lynaugh*, 492 U.S. 302, 352 (1989) (Scalia, J., concurring in part, dissenting in part); *Butler v. McKellar*, 494 U.S. 407, 413 (1990); *Saffle v. Parks*, 494 U.S. 484, 488 (1990).

and this Court has never arrogated for itself the right to decline claims properly presented under § 2254(a) that a state prisoner is in custody in violation of the "Constitution or laws" of the United States. As noted *supra*, at pp. 15-17, this Court went out of its way in *Stone* to disavow any such interpretation of its decision. The habeas doctrines implemented by this Court to minimize federal-state friction – *see, e.g., Wainwright v. Sykes*, 433 U.S. 72 (1977) (state procedural default); *Ex parte Royall*, 117 U.S. 241 (1886) (exhaustion of state remedies); *McCleskey v. Zant*, 111 S. Ct. 1454 (1991) (abuse of the writ) – have all been limited to instances in which habeas petitioners sought relief on claims that had not been preserved and presented in a timely and proper fashion. Indeed, in each of these decisions the Court was careful to emphasize the enduring scope of the writ.[19]

II. There Is No Basis For Reversing the Sixth Circuit's Holding That Respondent Was Entitled To Habeas Corpus Relief Because Involuntary Statements Were Used at Trial As Evidence of Guilt.

All four of the federal judges who have considered this case concluded that the post-warning statements used by the State to prove Robert Williams' guilt at trial were "involuntary" under the "totality of the circumstances" and hence

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[19] *See, e.g., Ex parte Royall, supra*, 117 U.S., at 247 ("The grant . . . of jurisdiction to issue writs of *habeas corpus* is in language as broad as could well be employed."); *Wainwright v. Sykes*, supra, 433 U.S., at 79, 87 (reaffirming in the context of a *Miranda* claim raised in habeas corpus the holding of *Brown v. Allen* "that a state prisoner's challenge to the trial court's resolution of dispositive federal issues is always fair game on federal habeas"); *McCleskey v. Zant, supra*, 111 S. Ct., at 1462 (also reaffirming *Brown*).

To the extent the Court may find the historical development of habeas corpus relevant, respondent respectfully refers the Court to the briefs *amici curiae* filed in *Wright v. West, supra*, on behalf of the American Bar Association, Professor Mishkin, *et al.*, and Attorney General Civiletti, *et al.* Should the Court wish to direct argument on these issues, which are outside the scope of the questions presented here, respondent requests an opportunity to submit a supplemental brief applying the points cited in those briefs to the claims at issue in this case.

inadmissible under the rationale of *Oregon v. Elstad*, 470 U.S. 298 (1985), *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), and *Culombe v. Connecticut*, 367 U.S. 568 (1961). The warden seeks to assail this unanimous conclusion in three ways, but in each she manifestly fails to carry her burden. *First*, the warden contends that Fifth Amendment voluntariness claims (as well as all other constitutional claims) should be excluded from federal habeas jurisdiction when the petitioner has had an opportunity to raise them in state court – an argument that was raised neither in the certiorari petition nor in the court below, and that is therefore not properly before the Court. *Second*, she contends that the voluntariness issue was not exhausted – an argument that she expressly disclaimed in the court below, and thus also should not be considered by the Court. *Third*, she asserts that the Sixth Circuit's voluntariness analysis was so novel as to violate the principle of *Teague v. Lane*, 489 U.S. 288 (1989) – an argument refuted simply by reading the opinions below, which are based on the application of well-entrenched principles of law. The warden's failure to show adequate and cognizable grounds for reversing the Sixth Circuit's holding on voluntariness requires affirmance by the Court.

A. Petitioner's Argument That All Fifth Amendment Claims (and, Indeed, All Constitutional Claims) Should Be Conditionally Excluded From Federal Habeas Corpus Is Not Properly Before the Court.

The petition for certiorari in this case presented three questions. The first and third related to Mr. Williams' claim of voluntariness, and placed before the Court the issues of whether the voluntariness claim had been exhausted in the state courts (question 1), and, if it had, whether the Sixth Circuit had applied an incorrect standard or "new rule" in resolving the merits of that claim (question 3). Only the second question raised any issue as to the exclusion of claims from the scope of federal habeas corpus based upon full and fair opportunity to assert them in state court. That question read as follows:

> [W]here the premise of the Fifth Amendment ruling is a finding of a *Miranda* violation and where the petitioner has had one full and fair opportunity to raise the *Miranda* claim in state court, should collateral review of the same claim on a habeas corpus petition be precluded?

The question plainly frames the issue whether the rationale of *Stone v. Powell* should be applied to *Miranda* claims.[20] Nonetheless, in her brief on the merits, the warden spends only five pages of argument on whether *Stone* should be applied to *Miranda* claims, and devotes the entire balance of her brief (with the exception of two footnotes addressed below) to an argument that *Brown v. Allen*, 344 U.S. 443 (1953), should be overruled, and federal habeas petitioners precluded from asserting *any* Fifth Amendment claim that they were afforded a full and fair opportunity to litigate in the state courts. Moreover, the warden announces, "if this Court extends the rule in *Stone* to include all Fifth Amendment claims, *it could do so only by extending it to include all claimed violations of the Constitution.*" Pet. Br. 97-98 n.67 (emphasis added). Thus, having induced the grant of certiorari by inviting this Court to consider the application of *Stone v. Powell* to *Miranda* claims, the warden now seeks a ruling that habeas review of *any* constitutional claim should be completely foreclosed if the habeas petitioner had a full and fair opportunity to raise the claim in state court.

Beyond being meritless,[21] the question briefed by the warden plainly is not fairly comprised in the question

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[20] Indeed, as rephrased in her brief on the merits, the second question presented is exclusively limited to whether *Stone v. Powell* bars collateral review. *See* Pet. Br. at i.

[21] Even the Solicitor General recognizes that there is no basis for extending the principles of *Stone v. Powell* to voluntariness claims (let alone to *all* constitutional claims, as the petitioner advocates). *See* U.S. Br. 17 ("It is, of course, still open to a state prisoner to claim on habeas corpus that his statements were in fact involuntary under the Fifth Amendment itself, as opposed to . . . being admitted in contravention of *Miranda*'s . . . rules.").

presented in the petition for certiorari, and thus is not properly before the Court. As this Court's Rule 14.1(a) makes clear, "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." Rule 24.1(a) further emphasizes that "the brief may not raise additional questions or change the substance of the questions already presented in [the petition for certiorari]." Ironically, the Court emphasized in *Stone v. Powell* itself that "only in the most exceptional cases will we consider issues not raised in the petition." 428 U.S., at 481 n.15. *See, e.g., Yee v. City of Escondido*, 112 S. Ct. 1522, 1532-33 (1992).

These words have particular resonance here, for just last Term, in *Wright v. West, supra*, the Court was asked to consider, *inter alia*, whether *Brown v. Allen*, 344 U.S. 443 (1953), should be overruled and replaced by a principle of deference by federal habeas courts to state-court resolution of federal constitutional questions. Despite the briefing and argument of this issue – which involved detailed attention in the briefs of both the parties and the many *amici curiae* to the same historical questions addressed by the warden's brief in this case – the majority of this Court either rejected or declined to consider the argument that *Brown v. Allen* should be overruled. *See Wright v. West, supra*, at 4644 (White, J., concurring in the judgment); *id.*, (O'Connor, J., concurring in the judgment); 4647 (Kennedy, J., concurring in the judgment); 4648 n.1 (Souter, J., concurring in the judgment). Even the three justices who appeared receptive to a rule of deference to state courts stopped far short of adopting Warden Withrow's broad argument that habeas review of *any* federal constitutional claim should be foreclosed altogether when there has been an opportunity to present the claim in state court. *See id.*, at 4643-44 (opinion of Thomas, J.).

The warden's extravagant arguments have, in any event, been waived. She never argued below that all constitutional claims (or even all Fifth Amendment claims) should be excluded from federal habeas corpus when there has been an opportunity to raise them in state court. Indeed, she specifically told the Sixth Circuit that the principles of *Stone*

should *not* be extended to Fifth Amendment voluntariness claims (Br. App. 15 (emphasis added)):

> Respondent [*i.e.*, petitioner Withrow] discerns a difference between a Fourth Amendment claim, raising a question of the reasonableness of a search and a Fifth Amendment claim, raising the question of the voluntariness of a confession: the former involve[s] evidential questions reflecting a policy decision to deter unlawful police conduct by suppressing evidence of a third-party's criminality; the latter cut[s] to the heart of the determination of guilt or innocence, calling into question the accuracy of the accused's own admission of guilt. *Accordingly, respondent perceives no legitimate basis for applying the rule in Stone v. Powell to cases involving the voluntariness of a confession.*

Thus, not only did the warden's petition for certiorari fail to raise the question she now argues, and not only did she fail to raise it in the court below; she actually argued *precisely the opposite* in the Sixth Circuit. Under these circumstances, the Court should express its "disapprov[al of] the practice of smuggling additional questions into a case after we grant certiorari," *Irvine v. California*, 347 U.S. 128, 129 (1954). Here, as in *Jones v. Hildebrant*, 432 U.S. 183, 188 (1977), it has become clear that the questions presented in the petition for certiorari were "only the tip of the iceberg." Instead of arguing the questions she herself presented to the Court, Warden Withrow has chosen to devote virtually all of her brief to a far broader question that was never raised in the courts below and that is obviously meritless under any of the views of the law expressed in the various opinions in *Wright v. West, supra*. As in *Jones v. Hildebrant*, the consequence of petitioner's game of bait-and-switch should be dismissal.

B. The State Expressly Waived the Argument That Robert Williams Failed To Exhaust His Voluntariness Claim.

Warden Withrow's cavalier approach to the questions on which this Court granted certiorari is further exemplified by

her "argument" on the first question presented – namely, whether Robert Williams exhausted his claim that involuntary statements were used against him at trial. That "argument" consists of a single citation incorporating by reference a three-paragraph footnote earlier in the brief. The footnote, in turn, addresses the exhaustion point only through rote citations to *Anderson v. Harless*, 459 U.S. 4 (1982), and *Picard v. Connor*, 404 U.S. 270 (1971), and fails to mention, let alone address, the basis of the Sixth Circuit's ruling on the exhaustion issue – namely, that in argument before the Court of Appeals the State expressly disclaimed any reliance on the contention that Mr. Williams' claims had not been exhausted. The Sixth Circuit concluded that "[a]t oral argument, the government conceded that this [exhaustion] position was without merit" (Pet. App. 13a, n.1).

The warden's answer to the Sixth Circuit's conclusion is only hinted at in her brief, but she apparently argues that she conceded exhaustion only of Mr. Williams' *Miranda* claim, and not of his voluntariness claim. *See* Pet. Br. 13. But this argument cannot be squared with the record, which makes clear that she never presented in a timely manner the claim she now advances.

In the District Court, the warden did not raise any exhaustion issue at all. In her Court of Appeals brief, by contrast, the warden argued that *none* of Mr. Williams' claims was exhausted, because, in her view, Mr. Williams "never raised *any* Federal issue at all relating to his confession in the State appellate courts – and, in point of fact, specifically limited his claim on appeal to State Constitutional law." App. Br. 5-6 (emphasis added; footnote omitted). Nowhere in her brief did the warden suggest that the exhaustion issues as to *Miranda* and voluntariness might be different.[22]

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[22] With respect to voluntariness, the warden did raise the separate claim that the issue had not been raised in the habeas petition; however, she presents no argument in her brief before this Court as to why this alleged defect in Mr. Williams' *pro se* draftsmanship should result in reversal of the lower courts' findings as to voluntariness. In effect, the District Court granted an amendment of

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At oral argument before the Sixth Circuit, counsel for the State devoted his entire allotted time to arguing the merits of the voluntariness issue and the question whether Mr. Williams had been in custody for purposes of his *Miranda* rights. When the Court directed counsel's attention to the exhaustion question, the following exchange occurred (Tape of Oral Argument, at counter 393-413 (emphasis added)):

> THE COURT:
>
> Just quickly, Mr. Caminsky, what about this exhaustion argument? Frankly, I thought the custody issue is so obvious a resolution that I thought we were going to hear you talk for 14 minutes about the exhaustion issue.
>
> MR. CAMINSKY:
>
> Well, I believe –
>
> THE COURT:
>
> So talk for two minutes, would you please?
>
> MR. CAMINSKY:
>
> Okay. *In terms of the exhaustion issues* it seems to me that the defendant in this case, in the state court appeal, appeared to have sought to try to get the state courts to adopt the focus test rather than the custody test. That seems to have been the basis of the entire state court appeal and in large measure I think that that may very well prevent them from granting the relief that he seeks. *I think that I probably did not really raise that sufficiently in the district court so I have a feeling that this court, if it chooses, could tend to overlook that.* In addition, upon rereading the defendant's brief, it seems to me that the defense attorney appears

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the petition to comport with the facts before her, *see* Fed. R. Civ. P. 15(b), and the warden cannot show any prejudice resulting therefrom, given her full and fair opportunity to litigate the voluntariness issue in the courts below.

> to have attempted to categorize it not as a state issue or as a *Miranda* test but as a *Miranda-Ziegler* test, I think that is what she called it. *So, I don't really think that if it is going to turn on exhaustion, I don't really feel comfortable arguing that too forcefully –*
>
> THE COURT:
>
> Thank you.
>
> MR. CAMINSKY:
>
> *– which is just one of the reasons I haven't chosen to do that.*

At no point in his argument did counsel for the State suggest to the Court of Appeals that his concession on the exhaustion issue was in any way limited to Mr. Williams' *Miranda* claims, and since no such distinction was hinted at in the warden's brief, the Sixth Circuit was quite justified in taking at face value the concession that the exhaustion argument was meritless and accepting the warden's invitation to rule on Mr. Williams' claims. Only when the Sixth Circuit ruled adversely on the merits did the warden argue for the first time in her petition for rehearing that, while the *Miranda* issue was exhausted, the voluntariness issue was not.

Under such circumstances, consideration by this Court of the exhaustion issue is plainly inappropriate. It is firmly established that "[i]t is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Duignan v. United States*, 274 U.S. 195, 200 (1927). *Accord, e.g., County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 245 (1985); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). This rule applies with equal if not greater force where a litigant has expressly conceded a point in the lower courts, for "[h]aving conceded this point in both courts below, [such a litigant] will not be heard to dispute it here." *Amadeo v. Zant*, 486 U.S. 214, 228 n.6 (1988). Nor does the warden's belated attempt to raise the exhaustion point as to the voluntariness claim in her petition for rehearing salvage it for her, for this Court has long recognized that the untimely raising of an issue only in a

rehearing petition in the court of appeals "precludes our consideration." *Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984); *cf. Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988).

Consideration of the exhaustion question is also inappropriate under substantive principles of exhaustion law. In *Granberry v. Greer*, 481 U.S. 129 (1987), this Court recognized that exhaustion is not a jurisdictional prerequisite to habeas review, and thus a State may waive the defense of nonexhaustion by failing to raise it in a timely fashion. *Granberry* addressed the situation in which a State, whether deliberately or inadvertently, failed to contest exhaustion in the district court, and then sought to rely on the defense of nonexhaustion on appeal. While declining to hold that such a default would in all cases constitute a waiver, the Court cautioned that it would be "unwise to adopt a rule that would permit, and might even encourage, the State to seek a favorable ruling on the merits in the district court while holding the exhaustion defense in reserve for use on appeal if necessary." *Id.*, at 132.

Here, unlike in *Granberry*, the State's disavowal of the exhaustion defense in the court below was not inadvertent, but express and deliberate. Permitting the State belatedly to raise the exhaustion issue after inviting the Court of Appeals to ignore it would send precisely the wrong message to litigants in habeas proceedings, providing them with an incentive to sandbag in the Court of Appeals by holding out the prospect that this Court will bail them out if they miscalculate. Under such circumstances, the "interests of comity and federalism" that govern the issue of waiver of exhaustion, *id.*, at 134, counsel precisely the same result as this Court's own longstanding policy of not addressing points not pressed below: the exhaustion issue should not be addressed here.

C. The Lower Courts' Ruling on Voluntariness Correctly Applied Settled Principles of Law and Is in No Way Contrary to *Teague v. Lane*.

The warden's final attack on the lower courts' voluntariness ruling is an argument that those courts applied a *per se*

rule that "a confession which follows *Miranda* warnings [is] involuntary merely because police indicate the possibility of lenient treatment if an accused tells them the truth." Pet. Br. i (third question presented). While the warden argues that this supposed *per se* rule constitutes a new rule of law that may not be applied in habeas proceedings under the principles of *Teague v. Lane, supra*, and *Sawyer v. Smith*, 497 U.S. 227 (1990), there is no reason to address that argument since neither court below applied any such rule.

Once again, the warden's argument on this question is astonishingly cursory, consisting only of a sentence incorporating by reference a footnote notable primarily for its lack of analysis.[23] The Solicitor General devotes somewhat more argument to the issue, asserting that the lower courts incorrectly adopted a *per se* rule derived from *Bram v. United States*, 168 U.S. 532, 542-43 (1897). *See* U.S. Br. 18-20. But the arguments of both the warden and the Solicitor General fundamentally mischaracterize the lower courts' rulings, for even a brief review of the opinions below shows that far from applying a novel *per se* rule that any inducements invalidate a confession, the courts simply applied familiar and long-settled principles of law.

Thus, the District Court explicitly noted that the voluntariness inquiry depends upon the totality of the circumstances analysis set forth in such cases as *Miller v. Fenton, supra, Oregon v. Elstad, supra, Schneckloth v. Bustamonte, supra*, and *Culombe v. Connecticut*, 367 U.S. 568 (1961). The court further recognized that *Bram v. United States, supra*, has "not been applied to establish a *per se* rule." Pet. App.

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[23] The state's primary argument that the lower courts applied a "new rule" is the assertion that the decision below is inconsistent with three, apparently randomly selected, decisions. One of the cases cited, *United States v. Mast*, 735 F.2d 745 (2d Cir. 1984), is easily distinguishable in that it did not involve the coercive setting of custodial interrogation. In the other two, *Commonwealth v. Saya*, 17 Mass. App. 921, 456 N.E.2d 764 (1983), *rev. denied*, 391 Mass. 1103, 461 N.E.2d 1219 (1984), and *People v. Pinkham*, 139 Ill. App. 3d 554, 487 N.E.2d 707 (1985), the courts specifically found that no promises of leniency had been made.

69a.[24] Indeed, the District Court did not rely directly on *Bram* itself, but rather on Justice White's opinion for the Court in *Brady v. United States*, 397 U.S. 742 (1970), which emphasized that *Bram* retains its vitality not as a *per se* rule, but rather as an example of a set of circumstances (improper inducements in the course of an uncounselled custodial interrogation) in which a confession *may* be held involuntary. *See* Pet. App. 58a-59a, 64a-65a.[25] Consistent with this approach, the District Court pointed to a number of factors (Pet. App. 64a, 70a-71a) – including the custodial setting of the interrogation, the absence of counsel, the serious and accusatory tone of the interrogation, and the repeated promises that Williams would "walk" if he talked (but otherwise would be locked up) to support its finding that, under the totality of the circumstances, Robert Williams' post-warning statements on April 10, 1985, were involuntary.

Similarly, the Sixth Circuit applied no novel *per se* rule, but instead correctly noted that the voluntariness inquiry required it to " 'examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of the statements.' " Pet. App. 9a (quoting *Oregon v. Elstad, supra*, 470 U.S., at 318). Applying this "totality of the circumstances" analysis, the Court of Appeals affirmed the District Court's ruling that in light of

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[24] Ironically, the District Court also cited and relied upon two of the very cases endorsed by the Solicitor General, *United States v. Long*, 852 F.2d 975 (7th Cir. 1988), and *United States v. Guerrero*, 847 F.2d 1363 (9th Cir. 1988), for the proposition that inducements to confess do not render a confession involuntary *per se*, but improper inducements are among the factors to be considered in an analysis of involuntariness.

[25] The Court's opinion in *Arizona v. Fulminante* confirms the appropriateness of this form of reliance on *Bram*. In *Fulminante*, the Court noted that in light of such cases as *Schneckloth v. Bustamonte*, *Bram* "does not state the standard for determining the voluntariness of a confession" if viewed as stating a *per se* rule against "any direct or implied promises, however slight." 111 S. Ct., at 1251. However, the Court endorsed an analysis that treated *Bram* as setting forth considerations that, in the proper case, may be viewed in the context of the totality of the circumstances as rendering a confession involuntary. *See id.* (citing with approval *State v. Thomas*, 148 Ariz. 225, 227, 714 P.2d 395, 397 (1986)).

the overall context of Mr. Williams' custodial interrogation and the "promises of leniency coupled with threats of immediate imprisonment," Mr. Williams' post-warning inculpatory statements were "coerced in violation of the fifth amendment." Pet. App. 19a.

There is nothing at all novel in this analysis. The "totality of the circumstances" analysis applied by both the Sixth Circuit and the District Court has repeatedly been reaffirmed by this Court, most recently in *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991). Nor is there anything out of the ordinary in the lower courts' holding that improper promises of leniency – and particularly promises that are illusory, Pet. App. 18a[26] – are important and sometimes decisive factors in the voluntariness analysis. *See Lynumn v. Illinois*, 372 U.S. 528 (1963). Indeed, both state and federal appellate courts uniformly hold that such promises of leniency may, depending upon all the circumstances, invalidate a confession.[27] While the results in

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[26] As the District Court noted, it was quite unlikely, given the evidence the police already had, that Mr. Williams would "walk" if he talked, as promised by the interrogating officers. Pet. App. 71a.

[27] A good example is the Arizona case cited approvingly in *Fulminante*, *State v. Thomas*, 148 Ariz. 225, 714 P.2d 395 (1986) (en banc), in which the Arizona Supreme Court reversed a lower court finding of voluntariness by focusing on the undisputed testimony of the defendant that a deputy had told him that a confession would have a beneficial effect on his sentence, and on the fact that it "was only after the deputy 'explained' the alternatives that defendant made the incriminating admissions." 714 P.2d, at 397. In an opinion cited by this Court as "accurately describ[ing] the State's burden of proof for establishing voluntariness," *Fulminante, supra*, 111 S. Ct., at 1251, the Arizona Supreme Court held that "the deputy's actions in obtaining the confession amounted to the 'exertion of any improper influence' and were therefore impermissible." 714 P.2d, at 397. Federal court decisions applying the same test used by the court below to examine the voluntariness of custodial statements made following alleged promises of leniency include: *Green v. Scully*, 850 F.2d 894 (2d Cir.), *cert. denied*, 488 U.S. 945 (1988); *Miller v. Fenton*, 796 F.2d 598, 609-10 (3d Cir.), *cert. denied*, 479 U.S. 989 (1986) (following remand); *United States v. Pelton*, 835 F.2d 1067 (4th Cir. 1987); *United States v. Shears*, 762 F.2d 397, 403 (4th Cir. 1985); *Hawkins v. Lynaugh*, 844 F.2d 1132, 1139-40 (5th Cir.), *cert. denied*, 488 U.S. 900 (1988); *United States v. Long*, 852 F.2d 975 (7th Cir. 1988); *Woods v. Armontrout*, 787

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particular cases may vary depending upon both the facts found as to the existence and nature of any promises of leniency and the other surrounding circumstances, there is no basic disagreement over the underlying principles that apply.

It is altogether bizarre to suggest that this is a case in which the lower courts either needed to, or did, resort to a *per se* rule "that the Fifth Amendment barred use of any confession obtained by 'any direct or implied promises, however slight.' " U.S. Br. 18 (quoting *Bram*). Robert Williams' interrogation involved far more than "promises," and those promises it did involve were far from "implied" and very far from "slight." Williams was first told that he was facing two life sentences on the basis of facts the police could prove. Next, he was told he could either give his interrogators what they deemed to be "the truth" or they would "simply" lock him up. Next, he was promised he would "walk" if he confessed to playing the precise accessorial role for which he was subsequently prosecuted, convicted, and given two life sentences. The promises which induced his confession – which were repeated throughout the successive interrogation sessions on April 10th – were tantamount to promises of non-prosecution (*cf. New Jersey v. Portash*, 440 U.S. 450 (1979)) and were not only subsequently dishonored (*cf. Santobello v. New York*, 404 U.S. 257 (1971)), but dishonest or utterly reckless at the time they were made (*see* note 26 *supra*). This was flagrant police misconduct when judged against the "long held" principle that "tactics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness."

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F.2d 310 (8th Cir. 1986); *United States v. Garot*, 801 F.2d 1241 (10th Cir. 1986); *United States v. Pinto*, 671 F. Supp. 41, 59 (D. Me. 1987). Other state court decisions include: *Womack v. State*, 281 Ala. 499, 205 So. 2d 579 (1967); *Turner v. State*, 48 S E.2d 522, 203 Ga. 770 (1948); *State v. Burr*, 126 Ariz. 338, 615 P.2d 635 (1980) (en banc); *People v. DeJesus*, 63 App. Div. 2d 148, 407 N.Y.S.2d 5 (1st Dep't 1978), *appeal dismissed*, 48 N.Y.2d 734, 422 N.Y.S.2d 379 (1979); *People v. Kyczek*, 307 Ill. 150, 138 N.E. 275 (1923); *Commonwealth v. Meehan*, 377 Mass. 552, 387 N.E.2d 527 (1979), *cert. dismissed*, 445 U.S. 39 (1980).

Miller v. Fenton, supra, 474 U.S., at 109-10. And there is nothing "new" about the lower courts' holdings that heavy-handed disregard of a suspect's rights is particularly likely to induce a confession. *See Brown v. Illinois*, 422 U.S. 590, 604-05 (1975); *Oregon v. Elstad, supra*, 470 U.S., at 312.

Thus, this is not a case in which a novel rule has been applied, or even one in which an established rule has been applied in a novel way. Rather, it is a case in which the established rule is inherently fact-specific, such that each unique set of facts requires an individually tailored outcome. The application of such a rule may in many cases be close or debatable. But where such a rule is at issue, it is not enough simply to seize upon a single outcome and assert that it constitutes application of a "new rule." As Justice Kennedy has written: "If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule." *Wright v. West, supra*, 60 U.S.L.W., at 4647 (concurring opinion). Like the rule of *Jackson v. Virginia*, 443 U.S. 307 (1979), which was at issue in *Wright v. West*, the voluntariness test under this Court's decisions "[b]y its very terms . . . provides a general standard which calls for some examination of the facts." 60 U.S.L.W., at 4647. "Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." *Id.*[28]

The warden and her supporting *amici* have manifestly failed to establish that the application of settled principles by the courts below is somehow so far out of keeping with other applications of the same principles as to constitute a "new rule." Indeed, a *Teague*

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[28] *Accord, id.*, at 4646 (O'Connor, J., concurring); *id*, at 4649 (Souter, J., concurring); *see also Stringer v. Black*, 112 S. Ct. 1130 (1992) (holding that application of established Eighth Amendment principles to capital sentencing scheme did not "break new ground" and was therefore not a "new rule" under *Teague*).

issue can only be manufactured in this case by grossly mischaracterizing the opinions below as following a *per se* rule that is nowhere expressed or implied in either of them. Accordingly, the Warden has supplied no basis for overturning the lower courts' voluntariness ruling.[29]

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals or dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,

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[29] The Solicitor General's brief also seems to invite the Court to review the lower courts' application of the "totality of the circumstances" voluntariness test. However, the question of the correctness of the Sixth Circuit's application of settled principles of law was not presented by the petition for certiorari, which, on the merits of the voluntariness issue, raised only the question whether the lower court had applied a novel *per se* test, and whether application of that test violated *Teague*. Since that question must be answered in the negative, there is no occasion for proceeding to review the lower courts' fact-specific analysis – a task that in any event is not a suitable use of this Court's limited time and resources. *See Hayes v. Florida*, 470 U.S. 811, 814-15 n.1 (1985); *Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5 (1984).

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No. 91-1030

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

PAMELA WITHROW,
Petitioner,

vs

ROBERT ALLEN WILLIAMS, JR.
Respondent.

ON WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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ARGUMENT

In their respective briefs, neither Respondent nor his supporting amici have made any points warranting a full response. However, Petitioner offers the following brief observations:

A.

RESPONDENT'S EFFORTS AT DISTINGUISHING STONE FROM MIRANDA DEMONSTRATE THAT RULES STEMMING FROM THE MIRANDA DECISION HAVE NO APPLICATION ON FEDERAL HABEAS REVIEW.

The central premise of Respondent's argument is that the holding in Stone v Powell, 428 US 465 (1976) does not apply to rules announced in Miranda v Arizona, 384 US 436 (1966), because Stone's treatment of Fourth Amendment claims gives no guidance in the realm of "true" prophylactic rules, such as those found in Miranda. Respondent's Brief, pp 18-20. Of course, as the Fourth Amendment's exclusionary remedy seeks to

prevent violations of the prohibition against unreasonable searches and seizures not by redressing the violation itself, but by removing any incentive the State might have to undertake a violation, it generously overprotects the Fourth Amendment interest at stake: the State may, after all, introduce evidence seized in violation of the Fourth Amendment at trial without violating the Fourth Amendment, see, eg, United States v Havens, 446 US 620 (1980), Alderman v United States, 394 US 165 (1969); cf, United States v Calandra, 414 US 338 (1974), and in Petitioner's view, this makes the Exclusionary Rule a prophylactic rule -- at least in the ordinary sense of the word.[1]

---

[1] While the primary thrust of the word is medical, Webster includes among its definitions: "...tending to prevent or ward off: preventive, cautionary." Webster's Third New International Dictionary of the English Language (Unabridged), (1966), p 1818. This usage reflects its roots, from the Greek prophylassein -- to keep guard before, or take precautions against.

If, however, we grant Respondent his distinction for the sake of argument, we see that his attempt to distinguish Miranda claims from the holding in Stone v Powell, 428 US 465 (1976) succeeds only in confirming the truth of Petitioner's argument:

Respondent notes that the exclusionary rule does not remedy Fourth Amendment violations directly, but deters future violations by rendering past violations fruitless; however, he reasons, as Fifth Amendment violations occur not in the police

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[1] Continued

Professor Grano takes the same definitional posture in identifying "prophylactic" rules. Grano, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 Nw L Rev 100, 105 (1985) ("What distinguishes a prophylactic rule from a true constitutional rule is the possibility of violating the former without actually violating the Constitution"). Whether he would describe the Exclusionary Rule as technically "prophylactic" is problematic, but largely beside the point: to the extent that it is not Constitutionally required, a rule of deterrence serves the function, and the goal, of a prophylactic rule.

station, but upon the introduction of a defendant's compelled statements at trial,[2] Miranda violations occur not in the interrogation room, but in the courtroom -- and therefore, Miranda is a "true" prophylactic rule, and Miranda claims do not fit within the rule of Stone v Powell. Unfortunately, following this logic not only leads to precisely the opposite conclusion, but also shows that Miranda was decided incorrectly: if a Fifth Amendment violation of the Constitution occurs only when the evidence is introduced at trial, Respondent's Brief, p 19, and the introduction of a defendant's voluntary

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2 Respondent's Brief, pp 18-20; see also, Brief of Amicus American Bar Association, pp 15-16, Brief of Amicus American Civil Liberties Union, pp 20-23.

Oddly enough, this logic contradicts the reasoning of the majority in Miranda. See, eg, 384 US at 467 ("Today, then, there can be no doubt that the Fifth Amendment privilege [against self-incrimination] is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way....").

statement does not violate the Constitution, see, eg, New York v Quarles, 467 US 649 (1984); United States v Washington, 431 US 181, 187 (1977); Oregon v Hass, 420 US 914 (1974); Harris v New York, 401 US 222 (1971), then there is no constitutional basis for Miranda in the first place -- and Respondent has effectively conceded that the introduction of a voluntary, Miranda-defective confession does not violate "the Constitution or laws or treaties of the United States." 28 USC 2254(a); US Const, Art III(2). See also, Duckworth v Eagan, 492 US 195, 207-214 (1989)(O'Connor, J, concurring).

Of course, while the logic seems inescapable, Petitioner suspects that this is not Respondent's intent, and looks forward to his further thoughts on the matter at argument.

B.

PETITIONER HAS RAISED NOTHING IN ITS BRIEF THAT IS NOT FAIRLY CONTAINED WITHIN THE SCOPE OF THE ISSUES RAISED IN THE PETITION.

Respondent also claims that most of Petitioner's argument is not fairly within the scope of the issues presented: specifically, Respondent objects to Petitioner's broad alternative argument, concerning the Fifth Amendment application of Stone v Powell, insisting that this Court direct its attention no further than Miranda, and leave the rest of the Fifth Amendment alone. This is quite puzzling, in light of Respondent's further insistence that Miranda lies at the very heart of the Fifth Amendment:[3] if this be the case, then the Court must confront not only whether Stone v Powell should apply to

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3 See, eg, Respondent's Brief, pp 18-23, 26-34; Brief of Amicus American Bar Association, pp 12-20; Brief of Amicus American Civil Liberties Union, pp 15-19.

Miranda claims, but the extent to which Miranda claims themselves involve the Fifth Amendment. And this, in turn, makes Petitioner's broader argument well within the scope of the issues presented[4] --

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4 Rule 14.1(a); see, eg, Greer v Miller, 483 US 756, 761 n 3 (1987).

Oddly enough, Respondent's contrary claim notwithstanding, both the "Questions Presented" section, and the main Argument headings, are virtually identical in the Petition and in Petitioner's brief on the merits. In addition, Respondent appears to have overlooked the concluding paragraph of footnote 3 in the Petition itself.

Respondent's citation to Petitioner's treatment of Stone v Powell in the Sixth Circuit, Respondent's Brief, p 40, also warrants attention -- but not much: as Petitioner argues in its Brief, extending Stone to Miranda claims is "an exercise in elemental logic," Petitioner's Brief, p 88; however, applying it across the full range of Fifth Amendment concerns requires overruling Brown v Allen, 344 US 443 (1953). Since the Sixth Circuit can extend holdings of this Court into areas which logic commends, Petitioner could legitimately argue one point to the Sixth Circuit, and did so. But since the Sixth Circuit cannot overrule Brown v Allen, the Sixth Circuit had no legitimate basis for extending Stone v Powell to bar habeas consideration of the voluntariness of a confession; thus, this issue can only arise in a case before the Court.

As to Respondent's claim that it did not prejudice Petitioner's ability to litigate the question of involuntariness for

although, as Petitioner noted in its Brief, the issue is not necessary to decide the case, and the Court need address this point only if it chooses to do so.[5]

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4 Continued
Respondent to fail to raise the issue in his habeas petition, or for the District Judge to grant a surprise "amendment of the petition" at the time she issued her opinion, Respondent's Brief, pp 41-42, n 22, Petitioner finds it "merciful to pass over [the point] in silence." Sonicraft, Inc v NLRB, 905 F2d 146, 150 (CA 7, 1990).

5 In addition, though Respondent appears to disagree, it seems to Petitioner that this Court is better served by having the parties fully ventilate an area of the law, prior to its issuing an opinion of far-reaching consequences, rather than by limiting the litigants to the narrowest pigeon hole their opponent finds acceptable. To paraphrase Chief Justice Rehnquist, the Law, unlike an amoeba, cannot be infinitely subdivided. Cf, Ohio v Johnson, 467 US 493, 501 (1984).

Petitioner notes that the solution to a jigsaw puzzle is not always found by concentrating on little bits and pieces; often, one must stand back and look at the entire picture to make sense out of the problem. And when the author approaches the I-80 exit on southbound I-75, he finds it helpful to know whether his intended destination is Washington, Miami, or Los Angeles before deciding which way to go. Respondent does the country a disservice by pretending that the proper way to present a case to this Court is to limit the Court's perspective, rather than striving to enlighten it.

C.

THE RECORD RESPONDENT HAS KINDLY PROVIDED CONFIRMS PETITIONER'S CONCESSION IN THE SIXTH CIRCUIT THAT THE MIRANDA ISSUE WAS EXHAUSTED IN THE STATE COURT PROCEEDINGS.

Petitioner is grateful to Respondent for providing the record of oral argument before the Sixth Circuit. As Respondent's Brief demonstrates, pp 42-43, counsel for Petitioner made no concession about the voluntariness of Respondent's statements at oral argument, or the exhaustion of the issue in the state court, and the Sixth Circuit erred in proceeding on the opposite assumption.[6] This should settle the point once and for all.

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6 Respondent himself appears to misread the passage he has cited: directed to turn his attention to the exhaustion issue in the context of the "custody" issue, counsel replied by recounting the State court controversy over the focus-custody aspect of Miranda, cf, People v Hill, 429 Mich 382; 415 NW2d 193 (1987), cited Miranda specifically, and acknowledged that the court could consider that issue exhausted. Petitioner sees nothing about voluntariness -- or about the Fifth Amendment generally --

D.

TWO RECENT HABEAS CASES THIS COURT HAS DECIDED SINCE PETITIONER FILED ITS BRIEF APPEAR TO HAVE MINIMAL IMPACT ON THE ISSUES AT HAND.

Since Petitioner filed its brief, this Court has issued two opinions dealing with the subject of federal habeas: Wright v West, ___ US ___; 51 CrL 2184 (1992) and Sawyer v Whitley, ___ US ___; 51 CrL 2213 (1992). Neither case appears of particular relevance to the instant case -- except that the fractured decision in Wright demonstrates that this Court is still grappling with a number of conceptual problems in the area, which vanish when put

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6 Continued
mentioned at all, and given the factual posture of the case, construing counsel's concession as Respondent insists it must be taken strikes Petitioner as unreasonable.

In any case, as long as the record is available, the Court might find it enlightening to listen to another passage from the argument -- between counsel and the author of the Sixth Circuit opinion, concerning the appropriate level of federal court intrusion into the daily operation of local police agencies under our federal system of government. Though it has nothing to do with the questions presently at issue, the Court might find the discussion educational.

into perspective.[7]

E.

RESPONDENT SEEMS NOT TO CONTEST PETITIONER'S HISTORICAL ARGUMENT THAT THIS COURT HAS EXPANDED THE WRIT OF HABEAS CORPUS FAR BEYOND THE NARROW SCOPE OF REVIEW WHICH CONGRESS HAS AUTHORIZED.

Neither Respondent, nor Respondent's amici, have chosen to consult History in support of their arguments -- and, Petitioner notes, with good reason:

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7 In Wright, for example, Justices Thomas and O'Connor engage in an interesting historical debate over the degree of deference given to state court judgments in the days before Brown v Allen, 344 US 443 (1953) -- but both agree that prior to Brown, federal review of state court criminal convictions was quite limited. Petitioner's only comment is that if this limited review was what Congress authorized, this Court's subsequent wide-scale alteration of the scope of procedural rights available to state criminal defendants in the wake of Mapp v Ohio, 367 US 643 (1961) cannot effect an amendment of the statute, for under our Constitution the Court has no legislative power. Accordingly, the original meaning of the statute remains unaltered, and should still control: a court could not, after all, alter the historical meaning of a statute prohibiting "armed robbery" by reformulating "robbery"

Respondent claims, for example, that Petitioner's "historical claims are easily answered," Respondent's Brief, p 35, but nonetheless supplies no answer. The fact is that this Court currently has an inaccurate understanding of the term "habeas corpus" as employed by Congress in 1867, and reenacted since then, and now confuses it with a "writ of error." Similarly, the phrase "Constitution or laws or treaties of the United States," had a discernible historical meaning when enacted -- and its proper meaning differs from the common construction placed upon it today. As Petitioner tried to show in its brief, History demonstrates this -- and this, in turn, is probably why Respondent prefers to discuss other matters, instead.

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8 Continued
to mean "the state of being named Robert," and "armed" to mean "having one or more unamputated arms." Therefore, both Justices are correct, up to a point; but the conclusions to be drawn are not limited to those at issue in Wright.

F.

"BREVITY IS THE SOUL OF WIT."[8]

Lastly, at the risk of appearing boorish,[9] Petitioner observes that Respondent has devoted a large portion of his argument to criticizing the space allocations in Petitioner's Brief.[10] Given Respondent's lack of cogent refutation on any of the substantive points at issue, Petitioner takes this as a compliment to the force of its logic, and the persuasive power of its ideas.

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8 Hamlet, II, ii, 90.

9 But see, Planned Parenthood v Casey, ___ US ___; 51 CrL 2266, 2307 (1992)(Scalia, J, dissenting)(Noting that there are some things which are "beyond human nature to leave unanswered").

10 Among the examples of this odd form of advocacy, Respondent chastises Petitioner for the brevity of Arguments II and III, the length of counsel's labors in recounting eight centuries of habeas corpus jurisprudence for the Court, and the fact that the section of Petitioner's brief explaining why this Court should apply Stone v Powell to Miranda cases -- in light of the same eight centuries of jurisprudence just recounted -- was "only five pages" long.

10 Continued
Respondent's Brief, pp 14, 35, 38-41, 45.

Petitioner's only response is that counsel happens to concur with Rule 24.3, directing attorneys to make their briefs "as short as possible" -- and, unlike Respondent, tries to evaluate an argument by its wisdom, rather than its length. The length of an argument should, after all, reflect its complexity -- and complexity is not a necessary correlate of merit. Space devoted to a given point will also reflect the author's editorial judgment about the importance or difficulty of making relevant points in a matter which the Court will find interesting, intelligible, and illuminating: simple points may be stated simply; obscure points may need additional explanation. And as Petitioner's counsel cannot improve upon the reasoning of Justice O'Connor's concurring opinion in Duckworth, it seems like a waste of time and space to dwell upon the obvious. Furthermore, while Petitioner's counsel is no Lincoln, his topic is far more prosaic; and for all his faults and limitations, counsel is proud of the fact that in explaining why a defendant who did not appeal an issue did not exhaust his state remedies relating to that issue, for example, he needed only 100 words more than Lincoln did to recall the purpose and promise of the American experiment in self-government, mourn the thousands who fell at Gettysburg, and issue a call to arms to save the Union. Lincoln, Address at Gettysburg, November 19, 1863.

As for the common fallacy of mistaking the length of an argument for its merit, it is reputed that Lincoln once complemented a brother lawyer for being able to "compress the most words into the smallest ideas better than any man I ever met." Counsel suspects that this Court's experience may be similar, providing the rationale for the page limitations of Rule 24.3.

RELIEF

WHEREFORE, Petitioner prays that this Court reverse the holding of the Sixth Circuit Court of Appeals, and reinstate Respondent's state court conviction for first-degree murder.

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No. 91-1030

In the Supreme Court of the United States

OCTOBER TERM, 1991

PAMELA WITHROW, PETITIONER

v.

ROBERT ALLEN WILLIAMS, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether a federal habeas court should consider alleged violations of the prophylactic rules established in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), if the habeas claimant had a full and fair opportunity to raise the claim in a state court.

2. Whether an officer's promise to a suspect that the government will not press charges if the suspect tells the truth is so inherently coercive as to render any subsequent statements involuntary.

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INTEREST OF THE UNITED STATES

This case involves two significant questions of interest to the United States. The first is whether federal courts should entertain habeas corpus petitions raising *Miranda* claims, even where the State afforded the claimant a full and fair opportunity to raise the claim in a state court. Resolution of this question requires assessment of the proper balance between federal habeas jurisdiction and the finality of state determinations. Moreover, the Court's analysis of this question is likely to affect the disposition of similar claims by federal prisoners. The United States has participated in the past in cases raising claims regarding the scope of review of state criminal con-

victions on habeas corpus. See, *e.g.*, *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Engle* v. *Isaac*, 456 U.S. 107 (1982); *Reed* v. *Ross*, 468 U.S. 1 (1984); *Murray* v. *Carrier*, 477 U.S. (1986); *Wright* v. *West*, No. 91-542 (argued Mar. 24, 1992).

The second question is whether promises of leniency made by government officials are so coercive as to render subsequent statements involuntary. The Court's resolution of this issue will affect the circumstances under which the federal government can introduce confessions as evidence in federal prosecutions. Accordingly, the United States has participated in cases raising similar issues in the past. See, *e.g.*, *Arizona* v. *Fulminante*, 111 S. Ct. 1246 (1991); *Illinois* v. *Perkins*, 496 U.S. 292 (1990); *Duckworth* v. *Eagan*, 492 U.S. 195 (1989).

STATEMENT

1. Two police officers investigating the murders of Van Robin Hooper and Charles David Stanley in Romulus, Michigan, went to respondent's house on April 10, 1985. They asked respondent if he would come with them to the police station. He agreed to do so. Without handcuffing respondent, the officers drove him to the station in their unmarked car. At the station, the officers did not formally arrest respondent, but questioned him for some time without advising him of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Pet. App. 2a, 35a, 45a, 87a-88a.

When respondent denied any involvement in the murders, one of the officers, Sergeant Early, responded: "[T]he main thing on this is we want the shooter. We're not real interested in who was there or who was along for the ride or anything else. We

get the shooter on this and we're gonna pretty well be content." Pet. App. 2a-3a, 47a.[1] A few minutes later, Sergeant Early again explained to respondent:

> You know everything that went down. You just don't want to talk about it. What it's gonna amount to is you can talk about it now and give us the truth and we're gonna check it out and see if it fits or else we're simply gonna charge you and lock you up.

Id. at 3a, 48a. After this statement, respondent made a number of incriminating admissions. *Id.* at 51a.[2]

The officers then advised respondent of his *Miranda* rights. In the course of subsequent questioning, Early expanded on his offer to be lenient if respondent cooperated.[3] In particular, Early stated: "I'll make you

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[1] The officers recorded the conversations with respondent, but apparently no transcription of those recordings is in the record. Pet. App. 41a ("The two April 10, 1985 sessions have not been transcribed."). Thus, the only written record of these conversations appears in the court of appeals' opinion (Pet. App. 2a-7a) and in the somewhat fuller quotations and summary in the district court's opinion (Pet. App. 46a-48a, 60a-62a, 64a, 66a-68a). Respondent states (Br. in Opp. 11) that the Michigan Court of Appeals granted a motion requiring petitioners "to file the tapes of his confessions and the transcripts thereof." The copy of the order attached to respondent's brief in opposition, however, refers only to the tapes, and the record before the Court does not contain transcripts.

[2] The most important of these was petitioner's admission that he had given the murder weapon to another suspect on the night of the murder. He continued to deny, however, that he had been present at the murder scene. See Pet. App. 51a.

[3] Apparently this portion of the questioning, which is recorded on two tapes labeled "Rights in Office" and "Video," was not admitted into evidence at respondent's trial. As petitioner states (Pet. 14), the trial record suggests that the

a deal. You tell us everything that happened and you tell us the truth and I confirm it on a polygraph that you're telling us the truth. Yeah, you walk." Pet. App. 5a, 62a.[4] At this point, respondent made several incriminating admissions, including a statement—contradicting the account he had given earlier in the day—that he had been at the scene of the murders. See Pet. App. 62a-63a. After respondent failed a polygraph test, he was interrogated further on April 11 and 12, 1985. On April 12, respondent was arraigned on charges relating to the murders. See C.A. App. 230a-231a; Pet. App. 88a.

2. Before trial, the Michigan Circuit Court ruled (Pet. App. 87a-91a) that the statements made by respondent on April 11 and April 12 were inadmissible because they occurred after an improper delay in respondent's arraignment (*id.* at 90a-91a). On the other hand, the court rejected respondent's claim that the April 10 statements should have been suppressed based on the officers' failure to advise respondent of his *Miranda* rights when he accompanied them to the police station for questioning. *Id.* at 89a-90a. The court concluded that the pre-warning questioning did not violate *Miranda* because respondent "was free to leave at any time," *id.* at 90a. On direct appeal, the Michigan Court of Appeals affirmed. *Id.* at 92a-113a. With respect to the *Miranda* claim, the state appellate court concluded that the trial court correctly found that respondent was not in custody at the time he went to the police station. *Id.* at 95a-98a.[5] This Court denied respondent's petition for a writ of certiorari on the *Miranda* claim. *Williams* v. *Michigan*, 493 U.S. 956 (1989).

3. Respondent commenced this action by filing a petition for a writ of habeas corpus in the United States District Court for the Eastern District of

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government introduced only a single tape recording, People's Exh. 10, at respondent's trial. See Oct. 28, 1985 Tr. 166-168 (repeatedly referring to "the tape"). It is clear that the recording that was introduced did not cover all of the April 10 interrogation. See Oct. 29, 1985 Tr. 4 (Sergeant Early's testimony regarding a dialogue that "occurred in a subsequent interview approximately 15 to 20 minutes after the one we played yesterday").

Even if the tapes of the subsequent questioning were not themselves introduced, respondent still benefits by establishing that the statements he made during that questioning were involuntary, because Sergeant Early repeatedly referred in his testimony at trial to statements respondent made on April 10 after receiving *Miranda* warnings. See Oct. 28, 1985 Tr. 159-164 (testimony of Sergeant Early regarding admissions made by respondent after receiving *Miranda* warnings); Oct. 29, 1985 Tr. 4 (testimony of Sergeant Early indicating that certain admissions were made "in a subsequent interview approximately 15 to 20 minutes after the one we played yesterday").

[4] In another portion of the conversation, Early explained further:

> We told you if you are a witness to this and if you are telling the truth, and if you are willing to testify then we are not going to charge you as a co-defendant. * * *
>
> * * * We're still gonna go by that agreement. * * *
>
> Right now you're a witness to the crime. But we [w]ant the truth. If you start lying to us and you start playing games, yeah, we're gonna charge you. A witness doesn't do us any good unless he tells the truth. We're not trying to hang anybody with this, we're still gonna put you on a polygraph and you're gonna have to show us you're telling the truth and you're not being charged. That fair enough?

Pet. App. 66a-68a.

[5] Judge Hood dissented on another ground, arguing that respondent's counsel had not adequately advised him of a plea offer made by the prosecutor. Pet. App. 108a-113a.

Michigan. The district court granted the petition and overturned respondent's conviction. Pet. App. 29a-86a. The court first concluded that respondent was in custody from the point in the questioning at which Sergeant Early advised respondent that the officers would "lock [him] up" if he did not tell them the truth. *Id.* at 48a-50a. Thus, the court reasoned, all statements made by respondent between that point in the questioning and respondent's receipt of the *Miranda* warnings should have been excluded at respondent's trial. *Id.* at 51a-52a.

Because *Miranda* warnings were given before the subsequent sessions of questioning, the district court concluded that statements made in those sessions would be admissible unless they were coerced, and thus obtained involuntarily in violation of the Fourteenth Amendment. Pet. App. 52a-56a. The court noted several factors suggesting that the statements were voluntary, including evidence that respondent was not under the influence of drugs or alcohol; that he was not so young as to be particularly susceptible to police influence; that he had gained considerable experience with the criminal justice system during numerous prior encounters with police in the course of several prior convictions; and that the tapes showed that respondent was lucid throughout the questioning. *Id.* at 56a-57a.

Nevertheless, the court concluded that it was obligated to consider respondent's subsequent statements involuntary based solely on Early's offer of leniency. In the court's view, this Court's decision in *Bram* v. *United States*, 168 U.S. 532 (1897), articulated a bright-line rule that "even a mild promise of leniency" would render involuntary any confession made by an uncounseled defendant in custody. Pet. App. 58a-60a (quoting *Brady* v. *United States*, 397 U.S. 742, 754 (1970)).[6] Under this view, because Early's statement to respondent constituted a promise of leniency, respondent's subsequent statements were involuntary and thus not admissible against him at trial. Pet. App. 61a-75a.[7] Because the district court did not believe harmless error analysis could apply to an error resulting in the admission of an involuntary confession, it held that the conviction should be overturned. *Id.* at 75a.

4. The court of appeals affirmed. Pet. App. 1a-25a. First, the court affirmed the district court's conclusion that respondent was in custody from the time he was "given the choice of cooperating with the police or going to jail." *Id.* at 15a. The court summarily rejected petitioner's argument that *Stone* v. *Powell*, 428 U.S. 465 (1976), precluded habeas relief based on the *Miranda* violations. Pet. App. 24a-25a.

Second, the court of appeals concluded that the statements made after the officers administered *Miranda* warnings were not voluntary. Although it

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[6] The court noted that "federal courts have not interpreted *Bram* liberally," but apparently believed that subsequent limitations on *Bram* permitted nothing more than "[m]ere exhortations to tell the truth." Pet. App. 68a-69a. Because the "police [in this case] went far beyond mere exhortations to tell the truth," and instead "promised petitioner that if he told them the truth about the crime he would not be charged," the court concluded that *Bram* required it to find that the subsequent statements were involuntary. *Id.* at 70a.

[7] The court failed to note that the April 11th and 12th statements in fact had been excluded at trial (see Pet. App. 87a-91a); hence, its ruling rested not only on the April 10th statements, but also on the April 12th statements. See, *e.g.*, Pet. App. 72a-73a.

acknowledged that it was required to consider "the entire course of police conduct," Pet. App. 17a, it concluded, like the district court, that the statements were involuntary simply because they "were conditioned on [respondent's] belief that he would be released if he talked." *Id.* at 18a. Finally, the court of appeals rejected the argument that admission of the April 10th statements [8] was harmless error.[9]

SUMMARY OF ARGUMENT

1. Both the interests in finality and an appropriate respect for the separate adjudicatory processes of the States justify a limited role for federal courts considering habeas corpus petitions filed by state prisoners. One important limitation this Court has recognized is that federal courts should not entertain a Fourth Amendment claim urged by a state prisoner in a habeas corpus petition, so long as the State's courts afforded the prisoner a full and fair opportunity to present the claim. See *Stone* v. *Powell*, 428 U.S. 465 (1976).

The reasons underlying the rule of *Stone* v. *Powell* apply with equal vigor in the *Miranda* context. *Miranda*'s prophylactic rules are not mandated by

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[8] The court of appeals noted that the district court had erred in relying on the admission of the April 12th statements as a basis for habeas corpus relief, because those statements were not used at respondent's trial. See Pet. App. 21a.

[9] The court concluded that harmless error analysis was appropriate only after determining that *Arizona* v. *Fulminante*, 111 S. Ct. 1246 (1991), should be applied retroactively because *Fulminante* announced a "watershed" rule of criminal procedure that "alter[s] our understanding of the bedrock procedural elements" for purposes of *Teague* v. *Lane*, 489 U.S. 288 (1989). Pet. App. 22a-23a.

the Constitution, but instead go beyond constitutional requirements in order to minimize the violations of the Fifth Amendment that can occur in custodial interrogations. Accordingly, *Miranda*'s prophylactic rules lead to the exclusion of highly probative evidence not obtained in violation of the Constitution. Whatever the validity of enforcing *Miranda* at trial and on direct appeal of a conviction, the high cost to society of excluding this evidence outweighs the speculative possibility that belated reversal of a conviction on habeas corpus may give state officials an added incentive to comply with *Miranda*'s strictures. Federal courts therefore should not entertain *Miranda* claims in habeas corpus petitions filed by state prisoners.

2. The question then becomes whether respondent's inculpatory statements were involuntary and thus inadmissible under the Fifth Amendment itself. In this case, the lower courts, relying on this Court's decision in *Bram* v. *United States*, 168 U.S. 532 (1897), erroneously concluded that respondent's statements were involuntary solely because they were made in response to the officer's promise that respondent would not be charged if he truthfully told the officers what he knew about the murders under investigation.

Consideration of all relevant circumstances demonstrates that respondent's statements were voluntary. Respondent had been advised of his constitutional rights; he was not under the disabling influence of drugs or alcohol; he was lucid and experienced in the criminal process; and, perhaps most importantly, there was no evidence of any threat of physical violence. Taking these factors into account, there is no reason to believe that the officer's entirely legitimate offer of leniency somehow overbore respondent's will and made his subsequent statements

involuntary. Law enforcement officials have an important interest in attempting to secure evidence from cooperating individuals, in order to help the government identify all of the culpable individuals. A simple offer of leniency in exchange for cooperation should not in any way be considered improper. Hence, in the circumstances of this case, the subsequent statements were voluntary and thus admissible at respondent's trial.

ARGUMENT

I. FEDERAL COURTS ADJUDICATING HABEAS CORPUS PETITIONS SHOULD NOT GRANT RELIEF BASED ON VIOLATIONS OF *MIRANDA* v. *ARIZONA*

The power and responsibility of state courts to render final judgments in criminal cases is fundamental to our federal system. Accordingly, the role of federal courts in evaluating habeas corpus petitions filed by persons convicted of crimes in state courts is quite different from the role of the Supreme Court in reviewing convictions on direct appeal. The Supreme Court's review fulfills the requirement, necessary to a workable federal system, that one national tribunal be available to render conclusive decisions on questions of federal law. See *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 336-351 (1816). Accordingly, this Court's review on direct appeal appropriately extends to all issues of federal law properly presented by the state court's judgment.

By contrast, the costs of collateral review have led to a much more limited role for federal courts in considering collateral attacks on criminal convictions, even with respect to federal convictions. As Justice Harlan explained:

> Habeas corpus always has been a *collateral* remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review. The interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision, may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed.

Mackey v. *United States*, 401 U.S. 667, 682-683 (1971) (Harlan, J., concurring); see *Teague* v. *Lane*, 489 U.S. 288, 306 (1989) (plurality opinion of O'Connor, J.) (quoting this passage). Moreover, in Justice Harlan's view, "th[e] interest in finality might well lead to a decision to exclude completely certain legal issues, whether or not properly determined under the law prevailing at the time of trial, from the cognizance of courts administering this collateral remedy." *Mackey*, 401 U.S. at 683; see Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 142 (1970) (arguing that convictions should be subject to collateral attack "only when the prisoner supplements his constitutional [claim] with a colorable claim of innocence").

Finality furthers not only the procedural need to "assig[n] * * * final competence to determine legality," *Teague*, 489 U.S. at 309 (quoting Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 450-451 (1963)), it also serves important substantive goals of the criminal process. Most obviously,

"[w]ithout finality, the criminal law is deprived of much of its deterrent effect." *McCleskey* v. *Zant*, 111 S. Ct. 1454, 1468 (1991) (quoting *Teague*, 489 U.S. at 309).[10] Moreover, "[b]oth the individual criminal defendant and society have an interest in insuring * * * that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community." *Coleman* v. *Thompson*, 111 S. Ct. 2546, 2564 (1991) (quoting *Sanders* v. *United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting)).[11]

The costs of collateral review increase greatly when the original judgment was rendered by a state court, because federal habeas review "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Duckworth* v. *Eagan*, 492 U.S. 195, 210 (1989) (quoting *Harris* v. *Reed*, 489 U.S. 255, 282 (1989) (Kennedy, J., dissenting)). Hence, "[t]his situation has always been a flashpoint of tension in the delicate relationship of the federal and state courts, and this exercise of federal power should not be undertaken lightly where no significant federal values are at stake." *Duckworth*, 492 U.S. at 211. As Justice Powell explained, "[t]o the extent that every state criminal judgment is to be subject

[10] See Bator, *supra*, 76 Harv. L. Rev. at 452; Friendly, *supra*, 38 U. Chi. L. Rev. at 146.

[11] See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 262 (1973) (Powell, J., concurring) ("At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen."); Bator, *supra*, 76 Harv. L. Rev. at 452.

indefinitely to broad and repetitive federal oversight, [the Court] render[s] the actions of state courts a serious disrespect in derogation of the constitutional balance between the two systems." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 263 (1973) (Powell, J., concurring).

Recognizing these costs, the Court in *Stone* v. *Powell*, 428 U.S. 465 (1976), held that "the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial," so long as the State "provided an opportunity for full and fair litigation of a Fourth Amendment claim." *Id.* at 482.[12] The Court concluded that it should determine the cognizability on habeas of Fourth Amendment claims "by weighing the utility of the exclusionary rule against the costs of extending it to collateral review." *Id.* at 489. The Court then weighed the costs of applying the rule—which "deflects the truthfinding process and often frees the guilty," *id.* at 490—against the benefits—"the hope that the frequency of future violations will decrease," *id.* at 492. Because "the additional contribution, if any, of the consideration of search-and-seizure claims of state prisoners on collateral review is small in relation to the costs," *id.* at 493, the Court concluded that federal courts may not entertain Fourth Amendment claims filed by state prisoners seeking habeas corpus relief. *Id.* at 494. The Court explained that there is no

[12] Justice Powell previously had argued for this rule in his concurring opinion in *Schneckloth* v. *Bustamonte*, 412 U.S. at 250-275; Justice Black had argued for this rule in his dissenting opinion in *Kaufman* v. *United States*, 394 U.S. 217, 231-242 (1969).

> reason to assume that any specific disincentive already created by the risk of exclusion of evidence at trial or the reversal of convictions on direct review would be enhanced if there were the further risk that a conviction obtained in state court and affirmed on direct review might be overturned in collateral proceedings often occurring years after the incarceration of the defendant.

Id. at 493.

For the same reasons, the same rule should be applied to claims alleging violations of the rules established in *Miranda*. See *Duckworth*, 492 U.S. at 207-214; Friendly, *supra*, 38 U. Chi. L. Rev. at 163. The most important factor is that "[t]he *Miranda* rule is not, nor did it ever claim to be, a dictate of the Fifth Amendment itself." *Duckworth*, 492 U.S. at 209.[13] Rather, the *Miranda* rule is a judicially fashioned mechanism designed "to create institutional respect for Fifth Amendment values" by requiring officers to take special precautions to avoid even the appearance of a violation of the Fifth Amendment

[13] See *Oregon* v. *Elstad*, 470 U.S. 298, 306-310 (1985) ("The *Miranda* exclusionary rule * * * sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation."); *New York* v. *Quarles*, 467 U.S. 649, 654 (1984) ("The prophylactic *Miranda* warnings * * * are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'") (quoting *Michigan* v. *Tucker*, 417 U.S. 433, 444 (1974)); *Edwards* v. *Arizona*, 451 U.S. 477, 492 (1981) (Powell, J., concurring) (*Miranda* "imposed a general prophylactic rule that is not manifestly required by anything in the text of the Constitution."); see also *Miranda*, 384 U.S. at 444 (noting that it would be permissible to use procedures other than the specified warnings).

proscription on compelled self-incrimination. *Ibid.* Thus, there is no reason to doubt the reliability of evidence produced by questioning that does not result in an involuntary confession, simply because it fails to conform strictly to *Miranda*'s mandated requirements.[14] Accordingly, the Court's decisions interpreting the scope of the *Miranda* rules, like its decisions interpreting the scope of the exclusionary rule, have turned on the balance between the added deterrent effect to be gained by application of the rule in new situations and the effect of the exclusion of evidence on competing social interests. *Duckworth*, 492 U.S. at 210.[15]

On that point, all of the considerations that led the Court to preclude habeas review of Fourth Amendment claims support precluding habeas review of *Miranda* claims. Just as with the exclusionary rule, "the cost to society in the efficient enforcement of its criminal laws" is "most troubling." *Duckworth*, 492

[14] See *Michigan* v. *Harvey*, 494 U.S. 344, 350 (1990) ("the *Miranda* rules * * * result in the exclusion of some voluntary and reliable statements"); *James* v. *Illinois*, 493 U.S. 307, 312 (1990) (summarizing cases that permit the use of "incriminating yet voluntary and reliable statements elicited in violation of *Miranda* requirements"); *Elstad*, 470 U.S. at 312 (noting the "high cost to legitimate law enforcement activity" of the *Miranda* rules, which permit "the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder"); *Mincey* v. *Arizona*, 437 U.S. 385, 397-398 (1978); *Harris* v. *New York*, 401 U.S. 222, 224 (1971).

[15] See, *e.g.*, *Oregon* v. *Hass*, 420 U.S. 714, 721-723 (1975) (permitting use for impeachment of statements taken in violation of *Miranda*); *Tucker*, 417 U.S. at 448-451 (permitting use of statements of third party taken in violation of *Miranda*); *Harris*, 401 U.S. at 224 (permitting use to impeach testimony at trial of defendant's statements taken in violation of *Miranda*).

U.S. at 211. Because "[a]dmissions of guilt are * * * essential to society's compelling interest in finding, convicting, and punishing those who violate the law," *Moran* v. *Burbine*, 475 U.S. 312, 426 (1986), "the ready ability to obtain uncoerced confessions is * * * an unmitigated good," *McNeil* v. *Wisconsin*, 111 S. Ct. 2204, 2210 (1991). Hence, like the exclusion of evidence obtained in violation of the Fourth Amendment, the exclusion of voluntary confessions obtained without strict compliance with *Miranda* imposes heavy costs on society by "deflect[ing] the truthfinding process and often free[ing] the guilty," *Stone* v. *Powell*, 428 U.S. at 490; see *Elstad*, 470 U.S. at 312 (noting the "high cost to legitimate law enforcement activity" of "permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder"). Conversely, there is every reason to believe that

> [r]elitigation of *Miranda* claims offers little or no additional structural incentive to the police to abide by the dictates of that decision. The awarding of habeas relief years after conviction will often strike like lightning, and it is absurd to think that this added possibility of exclusion years after the police conduct at issue will have any appreciable effect on police training or behavior.

Duckworth, 492 U.S. at 211; see Friendly, *supra*, 38 U. Chi. L. Rev. at 163 ("The mere failure to administer *Miranda* warnings * * * creates little risk of unreliability, and the deterrent value of permitting collateral attack goes beyond the point of diminishing returns.").

The comments of the *Stone* Court apply with force in this context:

> The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice [and] may well have the * * * effect of generating disrespect for the law and administration of justice.

428 U.S. at 490-491. Hence, as Justice O'Connor stated in *Duckworth*, review of *Miranda* claims in federal habeas petitions "teaches not respect for the law, but casts the criminal system as a game and sends the message that society is so unmoved by the violation of its own laws that it is willing to frustrate their enforcement for the smallest of returns." 492 U.S. at 212. The court should hold that federal habeas courts may not consider *Miranda* claims raised by claimants who had a full and fair opportunity to raise those claims in the state courts. Because respondent had such an opportunity—as evidenced by the decisions of the Michigan Circuit Court (Pet. App. 89a-90a) and the Michigan Court of Appeals (Pet. App. 95a-98a)—the court of appeals erred in relying on respondent's *Miranda* claim as a basis for reversal of his conviction.

II. AN OFFER OF LENIENCY DOES NOT AUTOMATICALLY RENDER SUBSEQUENT INCULPATORY STATEMENTS INVOLUNTARY

It is, of course, still open to a state prisoner to claim on federal habeas corpus that his statements were in fact involuntary under the Fifth Amendment itself, as opposed to simply being admitted in contravention of *Miranda*'s extra-constitutional prophylactic rules. In considering any such claim, it is important to begin by recognizing that nothing in the Fifth

Amendment imposes a bar on the use of confessions or creates a presumption against the use of confessions. Instead, the law recognizes that "[a]dmissions of guilt are more than merely 'desirable,' * * * they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran* v. *Burbine*, 475 U.S. 412, 426 (1986).

Accordingly, the Fifth Amendment bars only the use of involuntary or coerced confessions. As the Court has explained:

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.

Schneckloth v. *Bustamonte*, 412 U.S. 218, 225-226 (1973) (quoting *Culombe* v. *Connecticut*, 367 U.S. 568, 602 (1961) (opinion of Frankfurter, J.)). To determine whether a confession falls within the forbidden class, the Court traditionally applies a test considering the "totality of all the surrounding circumstances." *E.g.*, *Schneckloth*, 412 U.S. at 226; see *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1251 (1991) (opinion for the Court of White, J).

Notwithstanding this general practice of considering all relevant circumstances, it was thought for a time, based on this Court's decision in *Bram* v. *United States*, 168 U.S. 532, 542-543 (1897), that the Fifth Amendment barred use of any confession obtained by "any direct or implied promises, however slight."

But the Court in *Fulminante* expressly overruled *Bram*, stating that "this passage from *Bram* * * * does not state the standard for determining the voluntariness of a confession." 111 S. Ct. at 1251. Accordingly, the decision in *Fulminante* establishes beyond dispute that federal courts evaluating the admissibility of a confession obtained by a promise of government leniency must consider *all* the surrounding circumstances; they should not require exclusion of the confession on the basis of a *per se* rule derived from *Bram*.[16]

The decision of the lower courts requiring exclusion of the statements made by respondent after being given the *Miranda* warnings cannot be reconciled with this standard. As discussed above, the district court commenced analysis of this question correctly, by noting several of the surrounding circumstances: respondent was not under the influence of drugs or alcohol; respondent was not so young as to be particularly susceptible to police influence; and, as the recordings of the interrogations demonstrated, respondent was a lucid individual who had gained familiarity with the interrogation process during the course of numerous prior felony convictions. Pet. App. 56a-57a. All of these factors,[17] as the district

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[16] See *Schneckloth*, 412 U.S. at 226 ("The significant fact about all of [the Court's] decisions [regarding voluntariness of confessions] is that none of them turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances.").

[17] It is also relevant, although the district court did not specifically mention it, that respondent at this point had received "advice * * * of his constitutional rights." See *Schneckloth*, 412 U.S. at 226 (noting the relevance of this factor).

court understood, "tend to indicate that any admissions petitioner made were voluntary." *Id.* at 57a.

But the court nevertheless concluded that this Court's decision in *Bram* required it to find the confessions involuntary. In its view, "even a mild promise of leniency," offered to an uncounselled suspect in custody, requires the court to exclude the confession. Pete. App. 59a. Thus, in the district court's view, any police activity "beyond mere exhortations to tell the truth" requires exclusion of resulting statements. *Id.* at 70a-71a. The court of appeals' analysis of the issue does nothing to remedy the district court's erroneous reliance on this single factor. To be sure, the court noted its obligation to consider "the entire course of police conduct," Pet. App. 17a, and "the totality of the circumstances," *id.* at 19a. But, like the district court, the sole factor identified by the court was the existence of the offer of leniency. See *id.* at 18a-19a.

In our view, analysis of the totality of the circumstances strongly supports the conclusion that respondent's incriminating admissions should not be held involuntary.[18] First, as the district court found, based

[18] This result is consistent with most decisions of the courts of appeals, which routinely have upheld confessions made in response to similar promises of reduced charges in cases, like this one, where no other factors suggested coercive pressures. *E.g.*, *Tippitt* v. *Lockhart*, 859 F.2d 595, 596-598 (8th Cir. 1988), cert. denied, 490 U.S. 1100 (1989); *Cole* v. *Lane*, 830 F.2d 104, 107-109 (7th Cir. 1987), cert. denied, 484 U.S. 1076 (1988); *United States* v. *Guarno*, 819 F.2d 28, 30-31 (2d Cir. 1987); *United States* v. *Shears*, 762 F.2d 397, 400-403 (4th Cir. 1985); see also *United States* v. *Long*, 852 F.2d 975, 976-978 (7th Cir. 1988) (leniency in sentencing); *United States* v. *Guerrero*, 847 F.2d 1363, 1365-1367 (9th Cir. 1988) (promise of consideration in future cases). The courts of appeals have reached similar results in cases involving promises to advise prosecutors of the defendant's cooperation. See, *e.g.*, *United States* v. *Baldacchino*, 762 F.2d 170, 179 (1st Cir. 1985); *United States* v. *Robinson*, 698 F.2d 448, 455 (D.C. Cir. 1983); *United States* v. *Fera*, 616 F.2d 590, 594 (1st Cir.), cert. denied, 446 U.S. 969 (1980); *United States* v. *Curtis*, 562 F.2d 1153, 1154 (9th Cir. 1977), cert. denied, 439 U.S. 910 (1978); *United States* v. *Frazier*, 434 F.2d 994, 995-996 (5th Cir. 1970).

on its review of the taped recordings of the questioning, respondent was a lucid and competent individual who fully understood the implications of his position.[19] Second, nothing in the offer made by the officers had any tendency to induce respondent to make false statements of any kind. Because they made it clear that any offer of leniency was conditioned on respondent's giving them a truthful account of the crime, so that he could be a useful witness, he had no incentive to falsely implicate others or to falsely implicate himself. Rather, he had every incentive to tell the truth. Third, there is absolutely nothing in the record suggesting the slightest possibility that respondent was influenced by any fear of physical violence.[20]

Finally, Sergeant Early did not behave improperly in offering leniency in return for respondent's cooperation with the investigation. Nothing in the Fifth Amendment casts doubt on the legitimacy of the

[19] Compare *Long*, 852 F.2d at 977 (admitting a confession made in response to an offer of leniency, noting that the defendant was not "an overly sensitive defendant susceptible to inducement, like that which *Bram* sought to protect").

[20] This circumstance compares favorably with the situation in *Fulminante*, in which the Court concluded that an offer of protection was sufficient to produce an involuntary confession, based largely on the existence of "a credible threat of physical violence." 111 S. Ct. at 1253.

government's interest in encouraging those with knowledge of criminal activities to cooperate with the government's efforts to identify more culpable individuals. Indeed, the firmly recognized propriety of the practice is reflected in the federal sentencing process, which specifically takes into account the government's need to encourage culpable individuals to assist investigators. See, *e.g.*, *Wade* v. *United States*, No. 91-5771 (May 18, 1992); 18 U.S.C. 3553(e) (allowing a court to impose a sentence below the mandatory minimum upon a motion of the government to reflect the defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense"); Sentencing Guidelines § 5K1.1 (allowing a court to impose a sentence below the Guidelines range in the same circumstances).

The police conduct at issue here is a far cry from the "unfair and even brutal police tactics [that] pos[e] a real and serious threat to civilized notions of justice," *Schneckloth*, 412 U.S. at 225, and thus lead to exclusion of confessions obtained by use of such tactics. At bottom, this case simply does not involve any "coercive government misconduct," *Colorado* v. *Connelly*, 479 U.S. 157, 163 (1986). Accordingly, the lower courts erred in concluding that the Constitution was offended by the use of respondent's statements as evidence at his trial.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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(2)

No. 91-1030

In The
Supreme Court of the United States
October Term, 1991

PAMELA WITHROW,
Petitioner,

vs

ROBERT ALLEN WILLIAMS, JR.,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE
SIXTH CIRCUIT

MOTION TO FILE BRIEF
AND
BRIEF AMICI CURIAE OF
AMERICANS FOR
EFFECTIVE LAW ENFORCEMENT, INC.,
JOINED BY
THE NATIONAL DISTRICT
ATTORNEYS ASSOCIATION, INC.
IN SUPPORT OF THE PETITIONER.

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THE NATIONAL DISTRICT
ATTORNEYS ASSOCIATION, INC.
IN SUPPORT OF THE PETITIONER.

MOTION OF AMICI
CURIAE TO FILE BRIEF
AND BRIEF.

This motion and brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by Counsel for the Petitioner. Consent to file has been declined by Counsel for the Respondent. The letters of Petitioner and Respondent have been filed with the Clerk of this Court, as required by the Rules.

Come now Americans for Effective Law Enforcement, Inc., and the National District Attorneys Association, Inc., and move this Court for leave to file the attached brief as *amici curiae,* and declare as follows:

1. *Identity and Interest of Amici Curiae.* The *amici curiae* are described as follows:

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* over eighty-five times in the Supreme Court of the United States and over thirty-five times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national membership organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding

purpose of reforming the criminal justice system for the benefit of all of our citizens.

2. *Desirability of an Amici Curiae Brief. Amici* are professional associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of adopting and implementing guidelines for the conduct of interrogations; and (2) prosecutors, county counsel and police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters and to prosecute cases involving evidence obtained thereby, and to represent local and state authorities in federal habeas corpus proceedings.

Because of the relationship with our members, and the composition of our membership and directors—including active law enforcement administrators and counsel at the state and national level—we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court. We respectfully ask this Court to consider this information in reaching its decision in this case.

3. *Reasons for Believing that Existing Briefs May Not Present All Issues.* AELE and NDAA are state and national associations, and their perspective is broad. This brief concentrates on policy issues, including the values served by the adoption of reasonable rules for guiding police conduct in the law of interrogation and the need for finality in the criminal justice system, including the need for the reform of federal habeas corpus jurisdiction. Although Petitioner is clearly represented by capable and diligent counsel, no single party can completely develop all relevant views of such issues as these.

4. *Avoidance of Duplication.* Counsel for *amici curiae* has reviewed the facts of this case and has conferred at length with counsel for Petitioner in an effort to avoid unnecessary duplication. It is believed that this brief presents vital policy issues that are not otherwise raised.

5. *Consent of Parties or Requests Therefor.* Counsel has requested consent of the parties. The consent of Petitioner has been received and filed with the Clerk of this Court. This Motion is necessary because the Respondent has declined to grant consent to *amici*.

For these reasons, the *amici curiae* request that they be granted leave to file the attached *amici curiae* brief.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

See Section on Identity and Interest of *Amici Curiae, supra.*

STATEMENT OF FACTS

The court below, *Williams v. Withrow,* 944 F.2d 284 (6th Cir. 1991), ruled that the federal district court had correctly decided, contrary to the findings of state courts in the defendant's case, that the defendant, suspected of murder, was "in custody" for interrogation purposes when police officers came to his house, searched him, transported him in an unmarked police car to the police station, and repeatedly conveyed to him that his options were to cooperate or go to jail; that his inculpatory statements made after this point but before the advice of rights was given to him should have been suppressed because of the failure of the police to give the warnings required by *Miranda v. Arizona,* 384 U.S. 436 (1966); and, further, that the inculpatory statements defendant made after receiving warnings were the result of police officers' promises that he would be freed and treated with leniency if he talked and their threats of imprisonment if he did not and, therefore, should have been suppressed as involuntary, under *Oregon v. Elstad,* 470 U.S. 298 (1985).

The Court of Appeals further ruled that the error in admitting the statements was not harmless beyond a reasonable doubt and, therefore, the district court's grant of habeas relief was affirmed.

In considering this brief of *amici curiae,* it is important to note that only two principal issues were presented to and ruled upon by the state appellate court. *People v. Williams,* 171 Mich. App. 234, 429 N.W.2d 649 (1988). The court held (1) that at the time of the police interrogation of the defendant he was not in custody for *Miranda* purposes, and

(2) that he did not establish, as ineffectiveness of counsel, the failure to communicate to him a plea offer made to counsel by the prosecutor. One of the three appellate justices dissented, but only with regard to the plea offer issue.

Upon appeal to the Michigan Supreme Court a remand was ordered for a finding by the trial court regarding the plea offer conversations between defense counsel and the prosecutor, and whether defense counsel reported the contents of the conversation to the defendant. Later, the Michigan Supreme Court denied the appeal because it "was not persuaded that the questions presented should be reviewed . . ." Certiorari was denied by this Court. *Williams v. Michigan,* 493 U.S. 956 (1989).

ARGUMENT

I

FEDERAL HABEAS CORPUS IS NOT WARRANTED WITH REGARD TO A *MIRANDA* PROPHYLACTIC RULE VIOLATION LITIGATED IN STATE COURT.

A determination of whether or not a person was in custody, so as to mandate the issuance of *Miranda* warnings, does not require an enlargement of the basic principle of federal habeas corpus. Certainly that issue is not deserving of any more consideration than a determination, already made by this Court, with regard to the status of physical evidence seized by the police. In neither situation is there the specter of evidence unreliability and the consequence of convicting an innocent person. The rationale of *Stone v. Powell,* 428 U.S. 465 (1976), is equally applicable to both—no federal habeas corpus once a defendant has had a full and fair opportunity to present his claim for review by the highest tribunal of a state.

Only where a state fails to provide and apply adequate measures within its appellate process to provide for a review of a defendant's constitutional violation claims should there be any federal intervention by means of habeas corpus. We here wish to call to this Court's attention that confession involuntariness was not raised in the defendant's appeal to the Michigan Appellate Court.

Amicus NDAA has long sought reform of this type of abuse of federal habeas corpus jurisdiction and has actively supported the need for federal legislation to accomplish this goal. In the absence of such legislation, *amici* submit that the continuing efforts of this Court to achieve reform of federal collateral review jurisdiction, with the latest example in *Keeney v. Tamayo-Reyes,* __ U.S. __, 112 S.Ct. __, 51 CrL 2069 (May 4, 1992), is the criminal justice system's best hope for achieving this needed reform. We respectfully request this Court to extend the rule of *Stone v. Powell* to Fifth Amendment-*Miranda* claims.

II

EVEN IF FEDERAL COLLATERAL REVIEW WERE ALLOWED, DEFENDANT'S CONFESSION, AFTER WARNINGS, WAS NOT RENDERED INVOLUNTARY BECAUSE OF THE INTERROGATOR'S INDICATION OF POSSIBLE LENIENCY.

Even if this Court were to consider the merits of a claim that an impermissible promise of leniency had been made to the defendant by his interrogator, the validity of his confession should remain unaffected. The kind of statements made to the defendant about the consequences of telling the truth would withstand the commendably fair test prescribed in a New York Statute: Did the promise present a "substantial risk" of a false confession? Art. 60.45, N.Y. Cr. Proc. Law, Book 11-A, McKinney's Consolidated Laws of N.Y.

CONCLUSION

Amici urge this Court to reverse the ruling of the court below and hold that this Court's rule in *Stone v. Powell* applies equally in cases raising Fifth Amendment-based *Miranda* issues; in the alternative, if this Court rules that collateral review is available in such case, *amici* submit that a confession following warnings is not involuntary merely because the police indicate the possibility of lenient treatment if the accused tells the truth.

Respectfully submitted,

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(3)

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

~~MOTION FOR LEAVE TO FILE AND~~ BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. When a state court has fully and fairly considered a claim under *Miranda* v. *Arizona*, should that question be reconsidered *de novo* on federal habeas corpus?

2. Where a defendant has presented only a *Miranda* claim to the state courts, may a federal court consider a claim that the confession was actually involuntary?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PAMELA WITHROW, Warden,

Petitioner,

vs.

ROBERT ALLEN WILLIAMS, JR.,

Respondent.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of petitioner in the above captioned case. Counsel for petitioner has consented, but counsel for respondent has effectively refused consent by failure to respond to repeated inquiries.

The interest of *amicus* is stated in the attached brief, at page 1.

In the accompanying brief, *amicus* argues that (1) the state court's application of *Miranda* v. *Arizona* need not be reviewed *de novo*; and (2) the voluntariness claims should be remanded for a proper analysis of exhaustion and procedural bar.

For the foregoing reasons, *amicus curiae* requests leave to file its brief.

June, 1992

Respectfully submitted,

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ROBERT ALLEN WILLIAMS, JR.,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves a collateral attack on a final judgment based in part on a claim which invokes a mere prophylactic rule and which has already been fully and fairly litigated in the state courts. Such unnecessary attack on the finality of criminal judgments is contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

Van Hooper and Charles Stanley were murdered while sitting in Hooper's car. Both were shot multiple times at close range. *People* v. *Williams*, 429 N. W. 2d 649, 650 (Mich. App. 1988). Petitioner Williams accompanied police to the station where he was questioned. After he began to implicate himself, the police arrested him and gave him *Miranda* warnings. The state court rejected claims that he was "in custody" prior to being placed under formal arrest. *Id*., at 650-651. However, the state trial court did suppress, on state law grounds, statements taken during an excessive delay before arraignment. Respondent's Brief in Opposition 5.

The federal district court granted habeas corpus relief. It disagreed with the state court's determination of when Williams was "in custody." *Williams* v. *Withrow*, 944 F. 2d 284, 289 (CA6 1991). It also found the post-warning statements to be involuntary. *Ibid*. The Court of Appeals affirmed.

SUMMARY OF ARGUMENT

Neither the history nor the language of the habeas corpus statutes require federal courts to redetermine every question of federal constitutional law *de novo*. The older precedents are squarely against such redetermination, and recent developments have created substantial exceptions to *de novo* review. The question of whether to review an issue *de novo* should proceed issue by issue.

The application of *Miranda* v. *Arizona* should not be reviewed *de novo*. It has virtually no connection with actual innocence. It does not involve a racial minority with special need for federal protection. It is not a core constitutional right. A reasonable, good-faith application of *Miranda* should be respected as final, subject only to review in this Court on certiorari.

The voluntariness claim is either unexhausted or procedurally barred. It should be remanded.

ARGUMENT

I. The habeas statutes do not require relitigation of all constitutional claims.

The supporters of *de novo* relitigation of every constitutional claim on habeas corpus generally assert that Congress has mandated such review. See, *e.g.*, *Brown* v. *Allen*, 344 U. S. 443, 510 (1953) (opinion of Frankfurter, J.); *Stone* v. *Powell*, 428 U. S. 465, 528 (1976) (Brennan, J., dissenting). Yet Justice Frankfurter was unable to cite any authority for this remarkable proposition, and those that have followed have generally just cited Justice Frankfurter. See, *e.g.*, *Butler* v. *McKellar*, 494 U. S. 407, 428 (1990) (Brennan, J., dissenting). In reality, Congress has mandated nothing of the sort.

A. Habeas Corpus to Challenge Jurisdiction.

The writ of habeas corpus guaranteed in the Constitution is the common law writ. *Ex parte Bollman*, 4 Cranch (8 U. S.) 75, 93-95 (1807). The common law writ was simply not available to review a judgment of conviction of a crime, so long as the court which entered the conviction had jurisdiction. *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 203 (1830). The constitutional basis of the objection made no difference. See *Ex parte Watkins*, 7 Pet. (32 U. S.) 568, 574 (1833) (direct Eighth Amendment challenge to constitutionality of sentence).

The *Watkins* rule, that imprisonment is not unlawful if the court rendering judgment had jurisdiction, was in effect when Congress passed the Habeas Corpus Act of 1867. Congress authorized the writ "where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. That

language is fully consistent with the *Watkins* rule, implying that Congress did not intend to change the grounds on which habeas corpus could be granted, but only intended to enlarge the class of persons eligible for it.

The early cases confirm that only jurisdictional defects were cognizable in state prisoner petitions under the 1867 Act. *In re Wood*, 140 U. S. 278, 286 (1891) refused to consider a claim of racial discrimination in jury selection on habeas corpus. *Wood* emphatically rejected the suggestion that the constitutional nature of the claim made a difference. *Ibid*. This holding is not the result of any hostility to the rule of *Neal* v. *Delaware*, 103 U. S. 370 (1881).[1] Justice Harlan wrote both opinions and reaffirmed *Neal* in *Wood*. See 140 U. S., at 284-285.

In *Markuson* v. *Boucher*, 175 U. S. 184, 185-186 (1899), the Supreme Court refused to consider a constitutional attack on state procedural statutes. The claim had been considered and rejected by the supreme court of the state. See *id*., at 184. "The jurisdiction is more delicate, the reason against its exercise stronger, when a single judge is invoked to reverse the decision of the highest court of a State in which the constitutional rights of a prisoner could have been claimed *and may be were rightly decided*, or, if not rightly decided, could be reviewed and redressed by a writ of error from this court." *Id*., at 187 (emphasis added). The rule of *Wood* remained in force through the 1920's. "[W]e hold, as this Court has repeatedly held, that the judgment of state courts in criminal cases will not be reviewed on habeas corpus merely because some right under the Constitution of the United States is alleged to have been denied to the person convicted." *Knewel* v. *Egan*, 268 U. S. 442, 446-447 (1925).

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1. Cf. *Duckworth* v. *Eagan*, 492 U. S. 195, 224 (1989) (Marshall, J., dissenting).

B. The Shift to Constitutional Claims.

The shift from jurisdictional to constitutional claims did not begin in state prisoner cases, but rather in federal prisoner cases. Until 1891, the Supreme Court had no general appellate jurisdiction in noncapital federal criminal cases. F. Frankfurter & J. Landis, *The Business of the Supreme Court* 109 (1928). Yet, the Supreme Court extended an effective appellate jurisdiction over the circuit courts, in a limited class of cases, through a strained interpretation of what was a "jurisdictional" defect. *Ex parte Lange*, 18 Wall. (85 U. S.) 163, 176 (1874) held that imposition of both a fine and imprisonment, under a statute authorizing only one or the other, was jurisdictional. *Ex parte Siebold*, 100 U. S. 371, 376-377 (1880) held that the constitutionality of the statute creating the offense was jurisdictional and subject to review on habeas.

Ex parte Nielsen, 131 U. S. 176, 184 (1889) contains broad language regarding habeas relief for violation of a constitutional right. *Nielsen* arose out of Congress's effort to suppress polygamy in the Utah Territory. Nielsen was charged with unlawful cohabitation and with committing adultery, two punishments for the same act. *Id*., at 177-178. Despite its broad language, the actual holding of *Nielsen* is that "the writ only lies when the *sentence* exceeds the jurisdiction of the court, or there is no authority to hold the defendant under it." *Id*., at 185 (emphasis added).

Lange, *Siebold*, and *Nielsen* have two important factors in common. First, there was no other remedy, due to the lack of appellate jurisdiction. Second, the sentence itself, as opposed to the procedure for obtaining it, was claimed to be an actual miscarriage of justice. If a statute is unconstitutional, the person convicted of violating it is innocent of any crime. In multiple punishment cases, the person has already suffered the punishment for his crime.

In cases denying relief, one or both of these factors is missing. In *Ex parte Royall*, 117 U. S. 241, 250-253 (1886)

an appeal was available. In fact, the appeal was argued together with the habeas petition and decided in Royall's favor. See *Royall* v. *Virginia*, 116 U. S. 572, 584 (1886). In *Wood*, *Markuson*, and *Knewel*, the petitioners' allegations, even if true, did not establish that they were innocent or otherwise exempt from punishment. In *Matter of Moran*, 203 U. S. 96, 105 (1906), Justice Holmes disposed of a self-incrimination claim by saying it did not go to the jurisdiction of the court. *Nielsen*'s sweeping language about constitutional rights was apparently not considered controlling beyond the specific case of a sentence exceeding the maximum punishment.

The first state prisoner case to imply that a procedural claim might be considered on federal habeas after exhaustion of state remedies was *Frank* v. *Mangum*, 237 U. S. 309 (1915). There was no challenge to the constitutionality of the statute defining the crime, the jurisdiction of the court in the traditional sense, or the propriety of the punishment if the trial had been properly conducted. The claim was that the trial had been dominated by a mob and therefore not a true judicial trial. *Frank* implicitly holds that habeas relief is available for such a claim, but defers to the state court factual finding that there was no mob domination. *Id.*, at 336.

Moore v. *Dempsey*, 261 U. S. 86, 91 (1923) granted relief for mob domination of a trial. *Moore* did not, however, throw the doors open to *de novo* review of every far-fetched constitutional claim. Only three years later, Justice Holmes, writing for a unanimous court, decried the abuse of treating every claimed constitutional error as a loss of jurisdiction. *Ashe* v. *United States ex rel. Valotta*, 270 U. S. 424, 425 (1926). Federal collateral attack on state criminal judgments was a delicate matter, "and it must be realized that it can be done only upon *definitely and narrowly limited grounds*." *Id.*, at 426 (emphasis added). See also *Knewel*, *supra*, 268 U. S., at 447.

In the 1930's and 1940's, habeas corpus came to be seen as a necessary remedy for fundamental injustices which could not be corrected on direct appeal. *Mooney* v. *Holohan*, 294 U. S. 103 (1935) recognized that knowing use of perjured testimony would be subject to correction on collateral review, *id.*, at 112-113, but abstained to allow the state courts to consider the claim, *id.*, at 115.[2] In the days before discovery, it would have been virtually impossible to make a record for review of such a claim on direct appeal.

Johnson v. *Zerbst*, 304 U. S. 458 (1938), *Walker* v. *Johnston*, 312 U. S. 275 (1941), and *Waley* v. *Johnston*, 316 U. S. 101 (1942) similarly involved fundamental errors, raising strong doubts of guilt, which are not susceptible to correction on appeal. An indigent and typically uneducated defendant deprived of counsel, as in *Johnson*, cannot be expected to properly perfect his appeal. A person coerced into pleading guilty, as alleged in *Walker* and *Waley*, will probably be under the same duress not to appeal, and the duress will be off the record in any case. See *Waley*, 316 U. S., at 104-105.

Waley finally cast aside the limitation of the writ to jurisdictional questions. "It extends also to those *exceptional* cases where the conviction has been in *disregard* of the constitutional rights of the accused, and where the writ is the *only* effective means of preserving his rights." *Id.*, at 105 (emphasis added). This is still a far cry from *de novo* relitigation of every constitutional claim. "Disregard" of rights implies something more serious than the mere disagreement of coordinate courts on close questions.

These three cases, which marked the final break from jurisdictional to constitutional questions, were all federal

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2. The state supreme court later found Mooney's claims to be factually groundless. *In re Mooney*, 10 Cal. 2d 1, 85, 73 P. 2d 554 (1937), cert. denied, 305 U. S. 598.

prisoner petitions. The impetus for the change was therefore not any inability or unwillingness of state appellate courts to safeguard federal constitutional rights. It was instead a recognition that for many prisoners, federal as well as state, there would be situations where *fundamental* constitutional violations raising *grave* doubt as to the actual guilt of the defendant would go uncorrected on direct appeal. In *Ex parte Hawk*, 321 U. S. 114 (1944), the Supreme Court reiterated that relitigation following exhaustion of state remedies was reserved for cases "where resort to state court remedies has failed to afford a *full and fair adjudication*." *Id.*, at 118 (emphasis added). Congress shortly thereafter codified the exhaustion doctrine, explicitly citing *Hawk* as a correct statement of the law. Revision note to 28 U. S. C. § 2254, 415 (1988 ed.).

The notion that state prisoners should get more rather than less review, compared to federal prisoners, came quite naturally in a case involving racial discrimination: *Brown* v. *Allen*, 344 U. S. 443 (1953). The question was precisely the one which *In re Wood*, *supra*, held was not cognizable on habeas. The serious problems with this decision have been thoroughly documented elsewhere and need not be repeated here. See, *e.g.*, Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 499-507 (1963). Suffice it to say that for many years after *Brown* v. *Allen*, "the Supreme Court . . . continued to assume, without discussion, that it is the purpose of federal habeas corpus jurisdiction to redetermine the merits of federal constitutional questions decided in state criminal proceedings." *Id.*, at 500. This assumption was made in spite of *Brown*'s failure to "provide a principled rationalization" of such a redetermination. *Id.*, at 502. See also Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Wright* v. *West*, No. 91-542, at 14-16.

Supporters of unlimited relitigation assert vehemently that Congress has codified the rule stated in Justice Frankfurter's concurring opinion in *Brown*. See, *e.g.*, Brief for Senator Biden and Representative Edwards as *Amici Curiae* in *Wright* v. *West*, No. 91-542, at 1-2 ("Biden Brief"). Vehemence cannot make up for lack of authority. Only two "authorities" are cited for the codification argument. There is a claim for codification by negative implication from 28 U. S. C. § 2254(d), which deals only with state court determinations of fact and says nothing about questions of law or mixed questions. Biden Brief 9. Then there is Congress's repeated failure to get a reform bill through both houses in one session, although each house has passed reform bills at various times. Biden Brief 9-16. These are slender reeds to support such a weighty proposition.

Congress does indeed have the power to remove this question from the judiciary, but only by *passing* a bill, not by *blocking* legislation. The bicameral legislature and presidential veto were deliberately created to make legislation difficult, because the Framers considered the legislature the most dangerous branch. See *The Federalist No. 48*, at 309 (Madison) (Rossiter ed. 1961). If Congressional power brokers can divest this Court of the ability to modify its own decisions merely by blocking legislation to overturn them, a new and dangerous mode of enacting laws has been created. See *INS* v. *Chadha*, 462 U. S. 919, 946-951 (1983).

C. Nonfundamental Constitutional Claims.

As the foregoing discussion demonstrates, it is entirely appropriate for this Court to examine *why* federal habeas for state prisoners was expanded so dramatically and to curtail that expansion where it has reached into areas where those reasons do not apply. Justice Frankfurter's opinion in *Brown* was based squarely on the premise that *fundamental* rights were at stake. 344 U. S., at 507. He seems to use the terms "fundamental fairness" and

"constitutional rights" interchangeably. See *id.*, at 507-508. This view is hardly surprising, because Justice Frankfurter was the foremost advocate of the view that the Fourteenth Amendment protected *only* fundamental rights, and he vigorously opposed the "incorporation doctrine." See *Adamson* v. *California*, 332 U. S. 46, 59-68 (1947) (concurring opinion).

In the years since *Brown* and *Adamson*, federal constitutional protections for state defendants have been transformed from a few essential protections into "a detailed Code of Criminal Procedure." Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 156 (1970). Yet the rule of *de novo* review was carried forward without reexamination. Appropriately enough, it was the author of *Johnson* v. *Zerbst* who sounded the alarm. At the time *Johnson* and the other cases were decided, "almost every 'constitutional right' [enforceable through habeas corpus] played a central role in assuring that the trial would be a reliable means of testing guilt." *Kaufman* v. *United States*, 394 U. S. 217, 237 (1969) (Black, J., dissenting). Imposition of the exclusionary rule on the states and an increase in federal criminal statutes caused an enormous growth in Fourth Amendment cases, and radically altered that underlying assumption. See *ibid*; *California* v. *Minjares*, 443 U. S. 916, 927 (1979) (Rehnquist, J., dissenting).

Other rules with little or no connection to the accuracy of the guilt determination followed in rapid succession. They include *Miranda* v. *Arizona*, 384 U. S. 436 (1966), the "no comment" rule of *Griffin* v. *California*, 380 U. S. 609, 615 (1965), and the endless microdissection of any jury instruction containing the word "presumed," see *Rose* v. *Lundy*, 455 U. S. 509, 541, 545 (1982) (Stevens, J., dissenting), to name just a few. While violation of these rules may be reversible error on appeal, it does not follow that they need be grounds for collateral attack. *Id.*, at 543. The suggestion that a rule recognized in this Court's

decisions as constitutional may not be fundamental may sound absurd, yet the doctrine of nonretroactivity followed by the same Court which established these rules conclusively establishes their nonfundamental character. *Id.*, at 543, n. 8; see also *Kaufman*, *supra*, 394 U. S., at 240 (Black, J., dissenting).[3]

Nonfundamental constitutional rules exist. The assumption underlying the extension of habeas review to all constitutional claims is no longer true. That is a reason to reconsider precedent. *Vasquez* v. *Hillery*, 474 U. S. 254, 266 (1986).

II. "Claims of constitutional error are not fungible."

A. Purposes of Collateral Review

There have been a number of proposals to restrict the availability of collateral review and some vehement assertions that we should leave it untouched. Each proposal for change and each opposition to change is based on assumptions about the purposes of habeas corpus. A brief review of the purposes is therefore in order.

1. Forcing courts to toe the mark.

The traditional view of the principal purpose of habeas corpus as a collateral attack is that stated by Justice Harlan in his separate opinion in *Mackey* v. *United States*, 401 U. S. 667, 687 (1971). "The primary justification given by the Court for extending the scope of habeas to all alleged constitutional errors is that it provides a quasi-

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3. Claims of "constitutional" error are limited only by the imagination of prisoners and their lawyers. In *Walker* v. *Goldsmith*, 902 F. 2d 16, 17 (CA9 1990), the Ninth Circuit actually reconsidered *de novo* a claim that jury selection procedures discriminated against people with names toward the end of the alphabet. Surely our courts have better things to do.

appellate review function, forcing trial and appellate courts . . . to toe the constitutional mark."

This function of habeas corpus was unnecessary when Congress first extended federal habeas to state prisoners. Section 2 of the same act reaffirmed the right of convicted prisoners to review of their federal questions in this Court by writ of error. Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 385, 386-387. This right remained intact until 1916, when Congress made review of most federal questions discretionary by writ of certiorari. Act of Sept. 16, 1916, ch. 448, § 2, 39 Stat. 726-727; see Frankfurter & Landis, *supra*, at 211-213. "[W]ith the growth of the country and the attendant increase in the Court's business, it could no longer perform its historic function of correcting constitutional error in criminal cases by review of judgments of state courts and had to summon the inferior federal judges to its aid." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 155 (1970).

This deputizing of the lower federal courts as mini supreme courts, with the power to set aside state supreme court decisions on the basis of mere disagreement, has problems of its own, however. Who is forcing the habeas courts to toe the mark? Who keeps *them* in line when they violate the right of the state to structure its criminal justice system as it sees fit, subject only to *genuine* constitutional restrictions? This Court must do so. See, *e.g.*, *Harris* v. *Pulley*, 692 F. 2d 1189 (CA9 1982), *rev'd*, 465 U. S. 37 (1984); *Adamson* v. *Ricketts*, 789 F. 2d 722 (CA9 1986), *rev'd*, 483 U. S. 1 (1987).

Yet this Court cannot take every case, and when it does not grave injustice may be committed. In *Adamson* v. *Ricketts*, 865 F. 2d 1011 (CA9 1988), cert. denied, 111 L. Ed. 2d 795, for example, federal relief was granted on the basis of disagreement with the state supreme court. The state court was correct and the federal appellate court was wrong, *Walton* v. *Arizona*, 111 L. Ed. 2d 511, 525, 110

S. Ct. 3047, 3053-3054 (1990), yet the hired killer Adamson still escapes full justice because certiorari was denied in his case.

2. Correcting fundamentally unjust incarcerations.

The oldest and most important purpose of habeas corpus is to set free those prisoners who have done nothing illegal. The celebrated *Bushell's Case*, 124 Eng. Rep. 1006 (1670), for example, freed a juror held in contempt for bringing in the "wrong" verdict. The concept of jurisdiction was first expanded beyond its usual meaning to cover cases where the defendant had been convicted of violating an unconstitutional statute and was therefore actually innocent of any crime. See *Ex parte Siebold*, 100 U. S. 371, 376-377 (1880). The early habeas cases on procedural claims involved circumstances raising grave doubt whether the defendants were actually guilty. See, *e.g.*, *Moore* v. *Dempsey*, 261 U. S. 86, 91 (1923) (mob-dominated trial).

The governing statute has long required the habeas court to "dispose of the matter as law *and justice* may require." 28 U. S. C. § 2243 (emphasis added). Thus "the imperative of correcting a fundamentally unjust incarceration," *Engle* v. *Isaac*, 456 U. S. 107, 135 (1982), is rightly assuming an increasing importance in habeas jurisprudence. See *McCleskey* v. *Zant*, 113 L. Ed. 2d 517, 544-545, 111 S. Ct. 1454, 1470 (1991) ("actual innocence" exception to abuse of the writ). Conversely, as we will describe in part B, below, use of habeas corpus to overturn fundamentally *just* incarcerations on procedural grounds is increasingly limited.

3. Giving every defendant a federal forum.

One reason often asserted against limitation of habeas corpus is the notion that every defendant should have the opportunity to litigate his federal questions in a federal forum. See, *e.g.*, Reitz, *Federal Habeas Corpus: Post-*

conviction Remedy for State Prisoners, 108 U. Pa. L. Rev. 461, 464 (1960). This position is founded on a deep distrust of state courts. *Ibid*. It asserts, in essence, that state courts are totally incompetent to adjudicate federal questions. See *Butler* v. *McKellar*, 494 U. S. 407, 430 (1990) (Brennan, J., dissenting).

Our judicial system simply is not structured that way. It has been understood from the very beginning that state courts could pass on federal questions. *The Federalist No. 82*, at 493 (Hamilton) (Rossiter ed. 1961). The desire for a federal forum, by itself, is insufficient to justify collateral attack on final convictions. A federal forum may be necessary where state remedies are grossly inadequate, as they may have been 30 years ago. See generally Reitz, *supra*. The contention that federal court resolution of every federal issue is essential today, however, is insupportable. See *Stone* v. *Powell*, 428 U. S. 465, 493, n. 35 (1976).

4. Guaranteeing perfection.

A fourth possible purpose of collateral review is to guarantee that no one is punished without a perfect trial. "But [this] Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error." *Kuhlmann* v. *Wilson*, 477 U. S. 436, 447 (1986) (plurality).

The "perfect trial" view obviously cannot be accepted in its extreme form, for otherwise every case would be infinitely relitigable. If convictions are ever to be final, we must at some point accept the proposition that some claims will no longer be considered. The unanimous decision of this Court in *United States* v. *Timmreck*, 441 U. S. 780 (1979) establishes this principle unequivocally. For nonconstitutional, nonjurisdictional claims, the line is drawn at errors which "result[] in a 'complete miscarriage of justice' or in a proceeding 'inconsistent with the

rudimentary demands of fair procedure.' " *Id*., at 784. The question, then, is not *whether* to accept the possibility of imperfection, but only *where* to draw the line. There is no apparent reason why constitutional claims as a group should all be on the same side of the line.

B. Limitations on Collateral Review.

There have been many proposals for modification of the Frankfurter-*Brown* rule. Looking through the list of those adopted and those rejected, we see that the Court has consistently preserved the enforcement and correction of injustice purposes of habeas corpus. In only one unique area has a federal forum been found necessary absent a substantial connection with actual innocence.

1. Partially adopted proposals.

Several proposed limitations on federal habeas are worth mentioning for the light they shed on the broader problem. Professor Bator's extensive article, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963), is devoted primarily to demonstrating that relitigation *de novo* on federal habeas is unjustified. He concludes with a recommendation that federal habeas courts consider actual guilt or innocence as an important, if not determinative, factor in deciding whether habeas relief ought to be granted. *Id*., at 528. Judge Henry Friendly spoke more directly to the same point. He proposed that "with certain exceptions, an applicant for habeas corpus must make a colorable showing of innocence. . . " before habeas relief could be granted. Friendly, *supra*, 38 U. Chi. L. Rev., at 150.

Neither proposal has been adopted for the first federal review. For successive petitions, however, Judge Friendly's view was endorsed by a four-Justice plurality of this Court, *Kuhlmann* v. *Wilson*, 477 U. S. 436, 454 (1986), with Justice Stevens indicating that guilt or innocence should be considered in the judge's discretion, *id*. at 476-

477 (dissent), along the lines of Professor Bator's proposal. Actual innocence is now an important exception to the procedural default and abuse of the writ rules discussed *post*, at 21-22.

The partial acceptance and partial rejection of these innocence-driven proposals indicate that innocence is relevant but that there is a continuing need for the enforcement function as well. A mechanism is needed to correct state court disobedience of controlling precedent, even in the case of clearly guilty defendants.

A different but equally substantial reform was proposed by Justice Stevens in his dissent in *Rose* v. *Lundy*, 455 U. S. 509 (1982). Justice Stevens divided constitutional claims into four categories: meritless claims, harmless errors, reversible but nonfundamental errors, and fundamental errors. *Id.*, at 543-544. The last category is described primarily by examples. *Id.*, at 544, nn. 9-11. The third category includes all claims under rules which had been held nonretroactive under the since-discarded test of *Linkletter* v. *Walker*, 381 U. S. 618 (1965). *Lundy*, 455 U. S., at 543, n. 8. These claims, said Justice Stevens, should not be grounds for habeas relief *at all*. *Ibid*.

Like the Friendly and Bator proposals, this one is aimed at preserving habeas for the innocent, but in a less direct manner. It excludes by category those claims of error which are unlikely to result in the conviction of an innocent person, rather than by examining guilt or innocence in the individual case.

The separation of constitutional claims into the categories suggested by Justice Stevens would reject the notion that constitutional claims are fundamentally different as a category from other claims. Instead, constitutional claims would be subject to inquiry as to whether the claimed violation is fundamental, similar to the inquiry presently made for nonconstitutional claims. Compare *Davis* v. *United States*, 417 U. S. 333, 346 (1974) with *United States* v. *Timmreck*, 441 U. S. 780, 784 (1979).

Those not qualifying as "fundamental" would not be grounds for collateral relief. Although Justice Stevens' classification was not adopted in *Rose* v. *Lundy*, it was incorporated in the definition of an exception to nonretroactivity, discussed *post*, at 21.

2. Stone v. Powell.

Stone v. *Powell*, 428 U. S. 465 (1976) accepted the proposition advanced in Justice Black's dissent in *Kaufman* and prohibited relitigation of exclusionary rule claims already fully and fairly litigated. The first hurdle that the *Stone* Court had to clear was to recognize that "exceptions to full review might exist with respect to particular categories of constitutional claims." *Id.*, at 478-479. The dissent retorted that "there is no foundation in the language or history of the habeas statutes for discriminating between types of constitutional transgressions . . . ." *Id.*, at 522 (Brennan, J.). That statement is unquestionably wrong. Early cases did unambiguously discriminate between jurisdictional and nonjurisdictional constitutional claims, see *ante*, at 3-4, and the shift to all constitutional claims was a relatively recent development, see *ante*, at 7-8. In the 187 years from the Judiciary Act of 1789 to the *Stone* decision, habeas corpus review of *all* constitutional claims was only the law for at most 34 years: from *Waley* v. *Johnston*, 316 U. S. 101 (1942) to *Stone* v. *Powell*. In the 153 years before *Waley*, the writ had been repeatedly held to lie only for jurisdictional claims.

Once *Stone* crossed the Rubicon, the rest of the analysis was straightforward. The main reason for rejecting *de novo* review is that the exclusionary rule is actually contrary to the accuracy of the verdict. *Stone*, 428 U. S., at 490-491. Thus, avoiding injustice actually weighs against habeas review. *Id.*, at 491, n. 31. *Stone* rejects the notion that a federal forum is especially necessary in this area and expresses confidence in the state courts. *Id.*, at 493, n. 35. In this area, at least, the *Stone* Court seems confident that the threat of federal habeas review is not

necessary to make state courts "toe the constitutional mark." See *id.*, at 521 (Brennan, J., dissenting) (quoting *Mackey* v. *United States*, 401 U. S. 667, 687 (1971) (opinion of Harlan, J.)). Finally, *Stone*'s cost-benefit analysis, see *id.*, at 493, implicitly holds that the possibility of imperfection in the state proceeding does not warrant *de novo* habeas review. The conviction of a criminal on valid, probative, but illegally seized evidence is not a restraint our "society deems to be intolerable." See *id.*, at 491, n. 31 (quoting *Fay* v. *Noia*, 372 U. S. 391, 401 (1963)).

As is often noted, the *Stone* majority did say "our decision today is *not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally." *Id.*, at 494, n. 37 (emphasis in original). This does not mean that the case is not relevant to creation of further exceptions, however. *Stone* does establish that *de novo* review is not required for all constitutional issues,[4] and it further sets forth some criteria for deciding which issues warrant *de novo* review. The actual decision on those issues must await appropriate cases. Such as this one.

3. Teague v. Lane.

The most important limitation on federal habeas review of state convictions came in *Teague* v. *Lane*, 489 U. S. 288 (1989). *Teague* recognized that a large category of claims exists where there is no need for the enforcement function of habeas corpus. These are cases where the petitioner seeks to apply a new rule created after the

4. *Stone* did indicate that the rule of *Mapp* v. *Ohio*, 367 U. S. 643 (1961) "is not a personal constitutional right." 428 U. S., at 486. Yet the rule must unquestionably be a constitutional rule, for there is no other legitimate basis for imposing on the states. This Court has no general supervisory power over rules of evidence in state courts. See *Estelle* v. *McGuire*, 116 L. Ed. 2d 385, 397-398, 112 S. Ct. 475, 481 (1991) (quoting *Spencer* v. *Texas*, 385 U. S. 554, 563-564 (1967)). The *Mapp* rule is either constitutionally mandated or it is wrong, and this Court has not seen fit to overrule it.

state court decision or where he seeks to create a new rule in the habeas proceeding itself. While "the threat of habeas" provides an "additional incentive" for state courts to observe "*established* constitutional standards," *id.*, at 306 (emphasis added) (quoting *Desist* v. *United States*, 394 U. S. 244, 262-263 (1969) (Harlan, J., dissenting)), no such function is served by setting aside state judgments *ex post facto* on the basis of "standards" not existing at the time of the state decision. It makes no sense to speak of forcing someone to toe a mark when that person does not know and cannot know where the mark is. See *id.*, at 306-307; cf. *Bouie* v. *Columbia*, 378 U. S. 347, 352 (1964) (retroactive expansion of scope of prohibition fundamentally unfair and unconstitutional).

Later cases have construed "new rules" broadly, thereby narrowly construing the enforcement function of habeas corpus. In *Butler* v. *McKellar*, 494 U. S. 407 (1990), Justice Brennan asserted in dissent that a narrow view of "new rules" was necessary to encourage state courts "to develop novel and more sophisticated understandings of constitutional guarantees." *Id.*, at 430, n. 37. By "more sophisticated" he apparently means more favorable to defendants and less favorable to enforcement of the criminal law. He urges, in effect, that habeas corpus should provide an incentive for state courts to err in the defendants' favor on close questions. Instead of toeing the mark, he implies, state courts should be encouraged to veer so far in defendants' favor that they avoid the area where the hidden mark might be.

The *Butler* majority rejects this notion. "The 'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Id.*, at 414. At least for questions of "pure law," *Butler* permits state courts to decide close questions honestly and

in their best judgment, without placing a thumb on the defendant's side of the scale.[5]

The *Teague/Butler* rule has exceptions, however. While the rule itself excludes from habeas corpus those issues where the enforcement purpose is weakest, the exceptions restore review for those cases where the possibility of actual injustice is strongest.

The first exception is for claims that the state cannot constitutionally punish the defendant's act. *Teague*, *supra*, 489 U. S., at 311. It also covers categorical exemptions from punishment. *Penry* v. *Lynaugh*, 492 U. S. 302, 330 (1989). This exception is substantially the same as the historical expansion of the writ in the post-Reconstruction cases. In *Ex parte Siebold*, 100 U. S. 371, 376 (1880), the petitioner claimed that Congress had no power to make his act a crime. In *Ex parte Lange*, 18 Wall. (85 U. S.) 163, 176 (1874), the petitioner was categorically exempt from the punishment imposed because he had already been punished for the offense. Penry similarly claimed that he was categorically exempt from capital punishment. 492 U. S., at 328-329.

This similarity is no accident. These cases deal with injustice of the first magnitude. If the law making the conduct criminal is unconstitutional, then the prisoner is actually innocent. An unconstitutional punishment is similarly an injustice in itself. It violates a "substantive categorical guarantee[] accorded by the Constitution, regardless of the procedures followed." *Id*., at 329.

The second *Teague* exception is for the denial of safeguards which are "central to an accurate determination of innocence or guilt" and "absolute prerequisite[s] to fundamental fairness." *Teague*, *supra*, 489 U. S., at 313-314. For this definition *Teague* relies explicitly on the injustice-relieving function of habeas corpus. *Id*., at 313.

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5. As of this writing, the question of whether *Butler* applies to "mixed questions" is before the Court in *Wright* v. *West*, No. 91-542.

The second exception corresponds to the second historical expansion of habeas corpus, and *Teague* explicitly cites the "classic grounds for the issuance of a writ of habeas corpus" to illustrate the exception. *Ibid*. (quoting *Rose* v. *Lundy*, 455 U. S. 509, 544 (1982) (Stevens, J., dissenting)).

Teague thus effectively carves out three classes of cases for special treatment. Disputes of pure law will be reviewed *de novo* on habeas corpus if they fall into categories having grave potential for actual injustice: the conviction of an innocent person, punishment beyond the maximum for the offense or the offender, or denial of the absolute essentials for a fair trial. Other disputes on abstract questions of law are reviewed only to see if the state courts were unreasonable in their conclusion. *Saffle* v. *Parks*, 494 U. S. 484, 490 (1990).

4. Procedural defaults.

Under the procedural default rule of *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977), a claim barred in state court by failure to assert it at the proper time is also barred on federal habeas, unless the petitioner had cause for the default and suffered resulting prejudice. *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986) established that even without cause and prejudice the claim would be considered if necessary to prevent an actual miscarriage of justice, i.e. if the defendant is actually innocent. *McCleskey* v. *Zant*, 113 L. Ed. 2d. 517, 544, 111 S. Ct. 1454, 1470 (1991) extended the *Sykes/Carrier* rule to claims defaulted by failure to assert them in the first federal habeas petition.

As with *Teague*, the basic rule excludes issues where the enforcement function is unnecessary, and the exception brings back in those cases where the need to correct injustice is controlling. When a state court properly refuses to consider claims defaulted without good cause, the court is not violating its duty, and there is no enforcement issue. See *Brown* v. *Allen*, *supra*, 344 U. S., at 486.

In this situation, the claim will never be litigated in a federal forum, and it is possible that one of the myriad rules of constitutional case law has actually been broken. Neither of these facts, however, is sufficient to reopen the final judgment of a court which has correctly applied the law in refusing to consider the claim. Yet a substantial probability that defendant is innocent will break down that barrier and permit consideration of the claim on the merits.

5. Racial discrimination.

There is one area where this Court has found a special need for a federal forum, even in the absence of a possibility of innocence. *Rose* v. *Mitchell*, 443 U. S. 545 (1979) rejected a call to extend the rule of *Stone* v. *Powell*, 428 U. S. 465 (1976) to claims of racial discrimination in the selection of the grand jury.

On one point, the grand jury discrimination claim is very similar to the exclusionary rule. It has no bearing on the defendant's innocence. Once a properly selected petit jury has duly found the defendant guilty beyond a reasonable doubt, the propriety of the grand jury's decision to indict him is beyond question. *Rose* v. *Mitchell*, *supra*, 443 U. S., at 586-587 (Powell, J., concurring in the judgment). However, there were two differences unique to jury discrimination claims.

First, the state judiciary itself chooses the grand jury. Instead of the usual claim where the state court sits as a neutral arbiter between prosecution and defense, in grand jury cases the state trial court adjudicates an accusation against itself. *Id.*, at 561.

Second, and perhaps more importantly, racial equality in selection of both grand and petit juries is a core constitutional right. It goes to the very heart of the Fourteenth Amendment. *Id.*, at 561-562. In sharp contrast to the recently created embellishments of the Warren Court era, it was the very first criminal procedure

right recognized after the ratification of the Fourteenth Amendment. See *Strauder* v. *West Virginia*, 100 U. S. 303, 310 (1880).

Racial discrimination is fundamentally different from all other claims. See *Powers* v. *Ohio*, 113 L. Ed. 2d 411, 427-428, 111 S. Ct. 1364, 1373-1374 (1991). A lack of public confidence in the fairness of the judicial system to racial minorities can have devastating consequences far beyond the individual case, as recent events have made all too clear. Federal review is uniquely necessary in this area. *Rose* v. *Mitchell* is correct, but its rationale does not extend beyond racial questions.

6. Harmless error.

In addition to retroactivity and the *Stone* v. *Powell* rule, constitutional claims are also treated differently when the prosecution claims that the error is harmless. In *Arizona* v. *Fulminante*, 113 L. Ed. 2d 302, 111 S. Ct. 1246 (1991), the Court was deeply divided over whether introduction of an involuntary confession was subject to harmless error analysis. Even so, the dissenters on this point readily agreed that some constitutional claims are subject to harmless error analysis and some are not. *Id.*, 113 L. Ed. 2d, at 319, 111 S. Ct., at 1253 (White, J., dissenting in part). The notion that all constitutional errors are *per se* reversible, see *Chapman* v. *California*, 386 U. S. 18, 42 (1967) (Stewart, J., concurring in the result), has completely vanished.

D. Categories of Claims.

The retroactivity cases, the harmless error cases, and *Stone* v. *Powell* together establish beyond dispute what Justice Stevens asserted in dissent in *Rose* v. *Lundy*, 455 U. S. 509, 543 (1982): "claims of constitutional error are not fungible." For example, a claim by an indigent defendant that he requested and was denied counsel is fundamentally different from a claim of a *Miranda* viola-

tion. The right to counsel was fully retroactive under the old view, *Kitchens* v. *Smith*, 401 U. S. 847 (1971), and would have been retroactive on habeas had the *Teague* rule been in effect at the time. *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990). *Miranda* itself was not retroactive, *Johnson* v. *New Jersey*, 384 U. S. 719, 721 (1966), and extensions of it have not been retroactive on habeas in the new regime *Butler*, *supra*, 494 U. S., at 416. The *Fulminante* majority concedes that denial of counsel is not subject to harmless error analysis, 113 L. Ed. 2d., at 331, 111 S. Ct., at 1265, while the dissent concedes that *Miranda* claims lack the "distinctive reasons" underlying its opposition to harmless error analysis, 113 L. Ed. 2d, at 320, n. 7, 111 S. Ct., at 1256.

Thus the degree to which the law is willing to tolerate imperfection varies from one rule to the next. The importance of the rule is weighed against the costs of overturning past proceedings for errors which were not errors at the time or which made no real difference in the outcome.

A similar weighing is in order to decide whether the possibility of imperfection with regard to a particular rule justifies the very substantial costs of relitigation *de novo* on habeas corpus. See *Stone* v. *Powell*, *supra*, 428 U. S., at 491, n. 31. Where the rule is essential to an accurate determination of guilt or to public confidence in fairness of the system, such review may be necessary. For a rule which involves neither of these concerns and which merely erects a protective buffer zone around a constitutional right, *amicus* submits that the cost of relitigation is unjustified.

III. *Miranda* claims fully and fairly litigated in state court need not be relitigated on federal habeas corpus.

The critical question of this case is whether the state court's determination of when Williams was "in custody,"

so as to trigger the requirement for *Miranda* warnings, should be ignored. See *Williams* v. *Withrow*, 944 F. 2d 284, 288-289 (CA6 1991). Should this issue come under the rule that "a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated"? *Ex parte Hawk*, 321 U. S. 114, 118 (1944). Or should it instead be governed by the assertion that "no binding weight is to be attached to the State determination"? *Brown* v. *Allen*, 344 U. S. 443, 508 (1953) (opinion of Frankfurter, J.). For *Miranda* claims, *amicus* submits that the *Hawk* rule is correct and should be restored.

The rules set forth in *Miranda* v. *Arizona*, 384 U. S. 436 (1966) are not found in the Constitution. *Miranda* is a prophylactic rule, judicially created to build a buffer zone around the Fifth Amendment right. See *McNeil* v. *Wisconsin*, 115 L. Ed. 2d 158, 167, 111 S. Ct. 2204, 2208 (1991). A violation of *Miranda* or its progeny does not mean that a defendant has actually been "compelled to be a witness against himself." Cf. U. S. Const. amend V. Indeed, in many *Miranda* cases it is quite clear that there was no compulsion. See *Minnick* v. *Mississippi*, 112 L. Ed. 2d 489, 501, 111 S. Ct. 486, 494 (1990) (Scalia, J., dissenting). *Miranda* is thus a step removed from the text of the Constitution.

Miranda is also far removed from the question of the accurate determination of guilt or innocence. A confession extracted through brutality may very well result in the conviction of an innocent person. See, *e.g.*, *Fay* v. *Noia*, 372 U. S. 391, 394-396 (1963), overruled on other grounds in *Coleman* v. *Thompson*, 115 L. Ed. 2d 640, 669, 111 S. Ct. 2546, 2565 (1991). Few people have the stamina to maintain innocence under torture. The mere failure to give warnings before asking questions, in contrast, is extremely unlikely to extract a false confession.

Unlike racial discrimination, there is no century-long history of state court resistance to *Miranda*. Cf. *Rose* v. *Mitchell*, 443 U. S. 545, 558-559 (1979). While the imple-

mentation may have been slow initially, the *Miranda* rule is now fully integrated into state procedures. Indeed, a substantial portion of this Court's recent *Miranda* cases have been reversals of state courts which extended the *Miranda* rule too far. See, *e.g.*, *California* v. *Beheler*, 463 U. S. 1121 (1983); *New York* v. *Quarles*, 467 U. S. 649 (1984); *Oregon* v. *Elstad*, 470 U. S. 298 (1985); *Pennsylvania* v. *Bruder*, 488 U. S. 9 (1988); *Illinois* v. *Perkins*, 110 L. Ed. 2d 243, 110 S. Ct. 2394 (1990).

The rule does not involve "discrete and insular minorities," see *United States* v. *Carolene Products*, 304 U. S. 144, 153, n. 4 (1938), with special needs for federal protection. The conviction of a defendant who is, in fact, guilty and who did, in fact, confess voluntarily is unlikely to cause a breakdown in public confidence in the judicial system, regardless of the merits of the *Miranda* claim.

A federal court which declines to reexamine a *Miranda* question accepts the possibility that a defendant may be convicted despite a *Miranda* violation. We are not here concerned with a violation of a bright-line rule so clear that reasonable judges cannot differ. We are only concerned with a case in the gray zone that surrounds the buffer zone that *Miranda* erected around the Fifth Amendment—a case, in other words, at least *two* steps removed from the core constitutional right.

Is imprisonment under such a conviction a restraint which our society deems intolerable? See *Fay* v. *Noia*, *supra*, 372 U. S., at 402. On the contrary, noncompliance with *Miranda* has been tolerated in many cases. Sylvester Johnson's sentence of death was upheld despite a lack of *Miranda* warnings for his confession. *Johnson* v. *New Jersey*, 384 U. S. 719 (1966). The cost of "seriously disrupt[ing] the administration of our criminal laws" was sufficient to outweigh the need for retroactive enforcement of *Miranda*. *Id.*, at 731. Horace Butler's sentence was also tolerable. *Butler* v. *McKellar*, 494 U. S. 407, 416 (1990). The violation of a prophylactic rule was insufficient reason to allow a repeated challenge to the well-deserved sentence of a rapist-murderer whose confession was, in fact, voluntary. The failure of the police to give the *Miranda* warnings has been found tolerable in a variety of situations. See *Harris* v. *New York*, 401 U. S. 222, 226 (1971) (use for impeachment); *Michigan* v. *Tucker*, 417 U. S. 433, 437-438 (1974) (discovery of third-party witness); *New York* v. *Quarles*, *supra*, 467 U. S., at 653 (public safety need for immediate answer); *Oregon* v. *Elstad*, *supra*, 470 U. S., at 304 (unwarned confession does not "taint" subsequent confession).

Presuming the historical facts to be as the trial court found them, see Resp. Brief Opp. 5-6; 28 U. S. C. § 2254(d), the state court ruling that defendant was not in custody when he made his unwarned statement is reasonable. Given the similarity of the situation to *California* v. *Beheler*, *supra*, 463 U. S., at 1122, one cannot say that the state court acted with "disregard" of defendant's constitutional rights. See *ante*, at 7.

The mere possibility that the state court erred in resolving a close question on the application of *Miranda* to specific facts is not so intolerable to our society that we must bear the delay and expense of relitigating such questions *de novo*. State courts are competent to adjudicate such questions, and when they have done so reasonably and conscientiously, mere disagreement with the result is insufficient reason for collateral attack.

IV. The voluntariness claim should be remanded for further proceedings on exhaustion and procedural default.

In addition to the *Miranda* claim, the Sixth Circuit also affirmed a grant of habeas relief on the question of actual coercion. *Williams* v. *Withrow*, 944 F. 2d 284, 290 (1991). In *Miller* v. *Fenton*, 474 U. S. 104, 112 (1985), this Court held that such questions would be reconsidered *de novo*

on federal habeas corpus. *Amicus* does not suggest reopening that question,[6] and this would not be a proper case for a "fully and fairly litigated" limitation in any event. It is plain on the face of Williams' statement of the case that no such claim has been presented to the state courts.

Williams was successful in the state trial court in obtaining suppression of some of the statements on independent state grounds. Resp. Brief Opp. 5-6. On appeal, Williams made two arguments "[w]ith respect to the confession issue." *Id.*, at 7. One was based on state law. *Ibid.* The *only* federal question presented regarding the confession, Williams' brief tells us, was the argument that "he was in 'custody' for the purpose of receiving these rights," i.e. the *Miranda* warnings, prior to the time he was actually warned. *Ibid.*

Where a claim has never been "fairly presented" to the state courts there are only two possibilities: it is either unexhausted or it is procedurally barred. See *Castille* v. *Peoples*, 489 U. S. 346, 351 (1989). If it is unexhausted, the petition must be dismissed. *Rose* v. *Lundy*, 455 U. S. 509, 522 (1982).[7] If it is procedurally barred, habeas relief must be denied unless Williams can qualify for one of the exceptions. See *Dugger* v. *Adams*, 489 U. S. 401, 406-407 (1989).

These questions turn on issues of state law and case-specific facts, both of which are inappropriate for resolu-

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6. As noted earlier, *ante*, at 25, voluntariness of confessions has a substantial connection with actual innocence.

7. The Sixth Circuit claims the state conceded exhaustion in oral argument. 944 F. 2d, at 288, n. 1. The state says it only conceded exhaustion on the *Miranda* issue, not the voluntariness issue. Pet. Cert. 20. Where nonexhaustion is patent, and the supposed concession is ambiguous at best, *amicus* submits that the exhaustion rule should be enforced. See *Granberry* v. *Greer*, 481 U. S. 129, 134 (1987) (consider interests of comity and federalism).

tion in this Court on certiorari. Reversal and remand are appropriate. See *Castille*, *supra*, 489 U. S., at 352.

CONCLUSION

The decision of the Court of Appeals for the Sixth Circuit should be reversed. The case should be remanded for determination of the exhaustion procedural default question on the voluntariness claim.

June, 1992

Respectfully submitted,

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(4)

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In The

Supreme Court of the United States

October Term, 1991

PAMELA WITHROW,

Petitioner,

v.

ROBERT ALLEN WILLIAMS, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MASSACHUSETTS, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

I. Where the petitioner has had a full and fair opportunity to raise a *Miranda* claim in state court, should collateral review of the same claim on a habeas corpus petition be precluded?

II. Whether the federal district court could grant habeas relief on an involuntary confession claim which had not been fairly presented to the state courts?

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No. 91-1030

In The

Supreme Court of the United States

October Term, 1991

PAMELA WITHROW,

Petitioner,

v.

ROBERT ALLEN WILLIAMS, JR.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MASSACHUSETTS, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI*

This case presents fundamental questions concerning the administration of justice implicated by the unique dual roles of our state and federal courts. Since the States must bear most of the costs of federal habeas review, the

amici have an interest in minimizing these costs by avoiding redetermination of *Miranda* claims in federal court where a full and fair opportunity to litigate has already been furnished in state court.

This brief is submitted by *amici* through their respective Attorneys General in accordance with Rule 37.5 of the Rules of the Supreme Court.

STATEMENT OF FACTS AND PROCEEDINGS

After a two-day bench trial, respondent Robert Allen Williams was convicted and sentenced for two counts of first-degree murder and one count of felony firearm charges in the Michigan Circuit Court of Wayne County. This conviction stemmed from his involvement in the murder of two males who had been found shot in a parked car on April 6, 1985.

Respondent Williams was questioned by police on four occasions: twice on April 10, 1985 and once each on April 11 and 12, 1985. The April 10th sessions were recorded on audiotape; the April 12th session was recorded on videotape and transcribed.

During the first questioning session at the station on April 10th, respondent Williams began to implicate himself after about 40 minutes. At this point, the questioning stopped and respondent was advised of and waived his *Miranda* rights and continued to respond to questions. Respondent Williams received *Miranda* warnings prior to the beginning of the remaining sessions during which further inculpatory statements were made.

The respondent filed a motion to suppress all the statements. At a suppression hearing, the state trial court received testimony from the respondent and the detective sergeant involved and reviewed the tape. The court excluded statements made on April 11th and 12th under Michigan case law. As to the first session on April 10th, the trial court found that respondent was not "in custody" and that once he was the focus of the investigation, he was advised of his rights. With regard to the second session on April 10th, the court found the respondent was advised of his rights and waived them and the statements were not improperly obtained. Only the April 10th statements were admitted at trial.

On appeal, the Michigan Court of Appeals held, after reviewing the record and listening to the tape, that the trial court's factual finding on the "custody" issue was not clearly erroneous and that respondent was not in custody until he was advised of his rights. *People v. Williams*, 171 Mich.App. 234, 429 N.W.2d 649 (1988). The Michigan Supreme Court and this Court declined discretionary review. *People v. Williams*, 432 Mich. 913, 440 N.W. 2d 416 (1989); *Williams v. Michigan*, 493 U.S. 956 (1989).

In considering respondent's *pro se* habeas petition, the U.S. District Court did not hold an evidentiary hearing or oral argument but did review the one transcript and the tapes of *all* the questioning sessions (including those which had been excluded by the state trial court). After concluding that an "independent determination" was warranted, the district court found that respondent Williams had been "in custody" during the first session of questioning. As to the *Mirandized* statements, the court held they were involuntary since they were induced by

improper promises of leniency, even though this issue had never been fairly presented in state court. The district court granted the petition for writ of habeas corpus. On appeal, the Sixth Circuit affirmed, *Williams v. Withrow*, 944 F.2d 284 (CA6 1991), and denied rehearing. This Court granted writ of certiorari. *Withrow v. Williams*, 112 S.Ct. 1664, 118 L.Ed.2d 386 (1992).

SUMMARY OF ARGUMENT

The district court greatly exceeded the limited scope of federal habeas corpus review here. In addition to disregarding the state court rulings by making its own "independent determination," the district court reviewed all the tapes and one transcript, which included evidence which had been suppressed by the state trial court.

An assessment of the costs and benefits of the judicially-established *Miranda* exclusionary rule cannot justify the relitigation of *Miranda* claims on collateral review after a defendant has already had a full and fair opportunity to litigate this issue in state court. The broad sweep of the *Miranda* rule countenances the exclusion of probative evidence. Significantly, the prophylactic *Miranda* rule does not confer a "personal constitutional right" and is not dictated by the Fifth Amendment. Further, the reasonable and good faith application of the rule in state court, which is subject to direct review to this Court, fulfills the deterrent function.

This Court should extend the *Stone v. Powell* standard to *Miranda* claims where a full and fair opportunity to

litigate in state court has been provided. Otherwise, substantial, unjustified costs to our criminal justice system will continue to be incurred and borne largely by the States. These costs include: allowing federal habeas courts to disregard or disrespect the co-equal status of state courts, their ability to apply the *Miranda* rule, and the state court's rulings; the exclusion of reliable evidence; an intrusion into matters of State sovereignty; an unnecessary consumption of limited judicial resources; a lack of repose in the enforcement of presumptively valid state court convictions; and an undermining of public confidence in the ability of our criminal justice system to resolve primary criminal justice disputes. The *Stone v. Powell* standard best balances the competing criminal justice interests at stake and minimizes the costs to our criminal justice system of relitigating *Miranda* claims on collateral review.

The Court need not consider the voluntariness claim, as it was not exhausted in state court. If the Court addresses the merits of this claim, the State of Michigan may be disadvantaged by having been deprived of an opportunity to develop subsidiary facts in state court which would be entitled to the presumption of correctness on federal habeas review.

ARGUMENT

I. THE *STONE V. POWELL* STANDARD SHOULD EXTEND TO *MIRANDA* CLAIMS

A. The District Court Completely Disregarded the Fully and Fairly Litigated State Court *Miranda* Ruling

Respondent Williams received a full and fair hearing of his *Miranda* claim before the state trial and appellate court. In issuing the writ of habeas corpus, the U.S. District Court misunderstood its function on federal habeas review as enabling it to sit in "review" of the state court judgment. The federal court exceeded the limited scope of habeas review by deciding it was compelled to "make an *independent determination* of whether or not petitioner was in custody during interrogation session one." (Emphasis added.) Because no evidentiary hearing or oral argument was held, the district court apparently made this *de novo* determination based upon its *independent* "analysis of the tape recording." In rendering its rulings, the district court not only disregarded the considered rulings of the state court, *see* note 9, *infra*, but also appears to have been influenced by considering evidence which had been suppressed by the state court and was not part of the state record.

B. Application of the *Stone* Standard Best Balances the Competing Criminal Justice Interests At Stake and Minimizes the Costs

After assessing the costs and benefits of the Fourth Amendment exclusionary rule considered on collateral review, this Court held in *Stone v. Powell*, that "a federal

court need not apply the exclusionary rule on habeas review of a fourth amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and in direct review." 428 U.S. 465, 495 n.37 (1976). The federal proceedings below provide a textbook example of why federal habeas resources should not be expended in resolving analogous claims under the *Miranda* exclusionary rule. *Miranda v. Arizona*, 384 U.S. 436 (1966). Unless this Court reverses the lower federal courts, the State of Michigan will have to consider the practicalities of retrying respondent, more than seven years after the murders occurred.

1. The Prophylactic *Miranda* Rule Does Not Confer A "Personal Constitutional Right"

As a starting point, in *Stone*, this Court observed that the Fourth Amendment exclusionary rule "is not a personal constitutional right," since it is a judge-made remedy "designed to safeguard Fourth Amendment rights generally through its deterrent effect." 428 U.S. at 486 (citation omitted); *id.* at 495 n.37. This same rationale applies to claims based upon the *Miranda* rule.

Simply put, failure to satisfy the preventative requirements of *Miranda* does not result in a constitutional violation cognizable on federal habeas review. The Fifth Amendment, which contains no reference to this remedial device, provides "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." As this Court has previously observed, "The

Miranda exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation."[1]

An application for a writ of habeas corpus by a state prisoner may be entertained in federal court "only on the ground that [the prisoner] is in custody in violation of the *Constitution* or laws or treaties of the United States." 28 U.S.C. § 2254(a) (emphasis added); *see also Estelle v. McGuire*, 502 U.S. ___, 112 S.Ct. 475, 116 L.Ed.2d 385, 396 (1991). Because the *Miranda* rule is a prophylactic, judge-made remedy which is not mandated by the Constitution, claims based upon *Miranda* do not meet the jurisdictional prerequisite for federal habeas review. *Accord Butler v. McKellar*, 494 U.S. 407, 110 S.Ct. 1212, 1217-18 (1990) (holding the rule in *Arizona v. Roberson*, 486 U.S. 675 (1988) constitutes a "new rule" and does not satisfy either of the two exceptions under the *Teague* doctrine for retroactive application).

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[1] *Oregon v. Elstad*, 470 U.S. 298, 306 (1985); *see also Duckworth v. Eagan*, 492 U.S. 195, 209 (1989) (O'Connor, J., concurring) ("The *Miranda* rule is not, nor did it ever claim to be, a dictate of the Fifth Amendment itself."); *New York v. Quarles*, 467 U.S. 649, 654 (1984); *Michigan v. Tucker*, 417 U.S. 433, 444-46 (1974); *accord Solem v. Stumes*, 465 U.S. 638, 644 n.4 (1984).

2. Any Incremental Benefits of Reviewing *Miranda* Claims On Collateral Review Are Outweighed by Substantial Costs to our Criminal Justice System

The *Stone* holding was premised on the Court's "weighing [of] the utility of the exclusionary rule against the costs of extending it to collateral review." *Stone*, 428 U.S. at 489. This Court, even on *direct* review, has already employed a similar cost-benefit analysis to determine when the *Miranda* exclusionary rule should be applied. Consequently, even on *direct* review, the *Miranda* exclusionary rule is not an absolute or automatic rule of exclusion.[2] If the benefits of the prophylactic *Miranda* rule are outweighed by special considerations under some circumstances on *direct* review, the question becomes whether our criminal justice system can afford the social costs resulting from the enforcement of the *Miranda* rule on *collateral* review.

Like the Fourth Amendment exclusionary rule, the primary purpose of the *Miranda* rule is to deter police

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[2] *See Quarles*, 467 U.S. at 657 ("situation posing a threat to the public safety *outweighs* the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination") (emphasis added); *Oregon v. Haas*, 420 U.S. 714, 723 (1975) (statements inadmissible in prosecution case in chief but admissible for impeachment); *Tucker*, 417 U.S. at 448-49 (testimony of third party not barred by *Miranda* rule); *Harris v. New York*, 401 U.S. 222 (1971) (statements used for impeachment purposes); *see also Duckworth*, 495 U.S. at 210 (O'Connor, J., concurring) (citing cases where the "deterrent effect" of the *Miranda* rule "is minimal and is outweighed by other competing interests"); *Brewer v. Williams*, 430 U.S. 387, 424, 427 (1977) (Burger, C.J., dissenting) (applying balancing test).

conduct that may lead to a potential constitutional violation. *Compare Stone*, 428 U.S. at 486-87 *with Elstad*, 470 U.S. at 308; *Haas*, 420 U.S. at 722-23; *Tucker*, 417 U.S. at 446-47. The deterrence objective is fulfilled by the good faith and reasonable application of the rule on direct review. The police are put on notice that their conduct may be judicially reviewed by the mere opportunity that a defendant has to request a suppression hearing in state court. Moreover, when, as here, a suppression hearing is held by the state court, the police conduct has already been scrutinized. *Cf. Stone*, 428 U.S. at 493 ("The view that the deterrence of Fourth Amendment violations would be furthered rests on the dubious assumption that law enforcement authorities would fear that federal habeas review might reveal flaws in a search or seizure that went undetected at trial and on appeal."). Once there has been a full and fair opportunity to litigate a *Miranda* claim in state court, not only are there diminishing returns to the deterrence objective by relitigating the application of the *Miranda* rule on collateral review in federal court, but any such returns cannot be justified in terms of the cost to the criminal justice system.[3]

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[3] *See Duckworth*, 492 U.S. at 211 (O'Connor, J., concurring); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 163 (1970) [hereinafter Friendly, *Is Innocence Irrelevant?*]; *cf. Vasquez v. Hillery*, 474 U.S. 254, 266-67 (1986) (O'Connor, J., concurring) (assessing incremental deterrent effect of collateral review of alleged discriminatory exclusion from the grand jury); *Stone*, 428 U.S. at 487, 493-94 (assessing incremental deterrent effect of Fourth Amendment exclusionary rule).

The efficacy of the deterrence function also depends on the timing of the review and application of the rule. Thus, the impact of deterrence will be the greatest where the rule is swiftly and certainly applied, *i.e.*, on direct review, not years later when the police officers and even state court judges involved with the case may no longer hold the same positions. Finally, it cannot be overlooked that any deterrent effect promoted by federal court review is maintained by the fact that the state court proceedings are always subject to direct review to this Court. In fact, many of the *Miranda* line of cases have been decided by this Court on direct review.

Another concern noted by the *Stone* Court is the impact of the exclusionary rule on the truth-finding process. 428 U.S. at 490. Importantly, the broad sweep of the bright-line *Miranda* rule is cast with disregard to the reliability of the statements or evidence in issue. *See Duckworth*, 492 U.S. at 210 (O'Connor, J., concurring) (noting that the *Miranda* rule is "unrelated to the truth seeking function of the criminal trial"); *Quarles*, 467 U.S. at 655 n.5 (noting "the failure to provide *Miranda* warnings in and of itself does not render a confession involuntary"); *Solem*, 465 U.S. at 644-45. Indeed, the "Fifth Amendment itself does not prohibit all incriminating admissions." *Quarles*, 467 U.S. at 654. Further, a *Miranda* claim raised as part of a collateral challenge will typically be unrelated to the central question of guilt or innocence. *Cf. Stone*, 428 U.S. at 490 & 492 n.31. Here, for example, the conclusion of the district court's memorandum opinion notes that habeas relief was granted independent of the accuracy of the inculpatory statements or of respondent's guilt or innocence. In this case, the reliability of the statements in question has not been challenged.

3. The Costs of Habeas Review: Impact on Comity

In evaluating whether claims based upon the prophylactic *Miranda* rule should be subject to collateral review, the costs of habeas review must be taken into account, including: (1) the impact on federal-state relations; (2) the interest in finality; and (3) other criminal justice system costs. For several reasons, "*most of the price* paid for federal review of state prisoner claims is *paid by the States*," *Coleman v. Thompson*, 501 U.S. ___, 111 S.Ct. 2546, 2559, 115 L.Ed.2d 640 (1991) (emphasis added):

a. Collateral Nature of Federal Habeas Review

By tradition and history, the primary obligation for the definition and enforcement of criminal laws in our federalism form of government resides with the States. *See Engle v. Isaac*, 456 U.S. 107, 128 (1982); *Palmore v. United States*, 411 U.S. 389, 402 (1973); *cf. Younger v. Harris*, 401 U.S. 37 (1971). The state trial court therefore not only provides what should be the "main event" in our criminal justice system, *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977), but also holds "the initial responsibility for vindicating constitutional rights." *Isaac*, 456 U.S. at 128.

Under our current criminal justice system, two opportunities exist for federal court review of state court decisions. *First*, a state conviction and sentence may be directly reviewed by this Court when a petition for certiorari is filed challenging the state court ruling. *See Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987); 28 U.S.C.

§ 1257 (appellate jurisdiction over cases arising in state courts). *Second*, normally after exhausting state remedies, a state prisoner may seek federal review of his state conviction and sentence by filing a petition for writ of habeas corpus, pursuant to the federal habeas corpus statute, 28 U.S.C. § 2254.[4]

This Court has acknowledged a significant distinction between the role and function of direct and collateral review. Consequently, not all rules are, or should be, identically applied on direct and collateral review.[5] In

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[4] Significantly, federal habeas review is not a constitutional obligation but a statutory one. In fact, for the first ninety-one years of our nation's history, there was no federal collateral review of state court decisions, until Congress enacted the federal habeas corpus statute. *See* Act of Feb. 5, 1867, Ch. 28, § 1, 14 Stat. 385 (codified at 28 U.S.C. § 2254).

[5] *See, e.g., Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion) (general doctrine against retroactive application of "new rules" on collateral review); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (no federal constitutional right to counsel on collateral review); *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977) ("The burden of demonstrating that an erroneous instruction [which was not objected to at trial] was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal."); *Stone*, 428 U.S. at 495 n.37 (Fourth Amendment exclusionary rule claims barred on habeas review where there is a full and fair opportunity to litigate in state court); *see also Rose v. Lundy*, 455 U.S. 509, 543-44 (1982) (Stevens, J., dissenting) (categorizing four types of constitutional errors and concluding not all should be subject to collateral review).

maintaining this distinction, this Court has reiterated that "direct appeal is the *primary* avenue for review of a conviction or sentence. . . . The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is *secondary* and *limited*. Federal courts are not forums in which to *relitigate* state trials."[6] Federal habeas review should be preserved for claims rooted in the Constitution but should not be expended to consider whether prophylactic rules have been violated. The *Miranda* rule should be fully enforced on direct review; the costs of enforcing the rule on collateral review cannot be justified.

b. Co-Equal Status of State Courts

In our dual criminal justice system, state courts are not inferior to federal courts in applying constitutional principles.[7] The federal habeas statute is not a vehicle for

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[6] *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983) (emphasis added); *see also Duckworth*, 492 U.S. at 212 (O'Connor, J., concurring); *Isaac*, 456 U.S. at 127 ("Liberal allowance of the writ, moreover, degrades the prominence of the trial itself."); *Mackey v. United States*, 401 U.S. 667, 682-83 (1971) (Harlan, J., concurring and dissenting); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 524 (1963) [hereinafter Bator, *Finality in Criminal Law*].

[7] The competency of state courts in applying federal constitutional principles has been repeatedly noted. *See Sawyer v. Smith*, 497 U.S. 227, 110 S.Ct. 2822, 2831, 111 L.Ed.2d 193, 210-11 (1990); *Swain v. Pressley*, 430 U.S. 372, 383 (1977); *Stone*, 428 U.S. at 493 n.35; *see also Rose v. Mitchell*, 443 U.S. 545, 579-80 (1979) (Powell, J., concurring); *Palmore*, 411 U.S. at 407, 410; O'Connor, *Trends in the Relationship between the Federal and State Courts from the Perspective of a State Court Judge*, 22 Wm. & Mary L. Rev. 801, 814-15 (1981); Bator, *Finality in Criminal Law*, at 451, 509.

allowing lower federal courts to determine whether, in their view, state courts were "correct" in their determination of facts and application of law. *Cf. Butler*, 494 U.S. at ___, 110 S.Ct. at 1271 (The "new rule" doctrine of *Teague* and its progeny "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."). To paraphrase Justice Jackson, federal courts "are not final because [they] are infallible, but [they] are infallible only because [they] are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

Because of the inherent "friction" resulting from this overlapping judicial system, *see Sumner v. Mata*, 449 U.S. 539, 547, 550 (1981); *Stone*, 428 U.S. at 491 n.31, this Court has recognized deference and respect must be afforded to state courts as the primary and first tribunals of criminal law enforcement in our criminal justice system.[8] However, independent or *de novo* federal habeas review of *Miranda* claims which have already been considered in state court disrespects the ability of state courts to apply

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[8] In a number of areas, Congress and this Court have established several principles to minimize this friction in federal-state relations in the administration of criminal justice. *See, e.g., Coleman*, 501 U.S. ___, 111 S.Ct. at 2554 (applying independent and adequate state ground doctrine); *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion) (general doctrine against retroactive application of "new rules" on collateral review); *Rose v. Lundy*, 455 U.S. 509, 516 (1982) (exhaustion doctrine under 28 U.S.C. §§ 2254(b), (c)); *Sumner*, 449 U.S. at 550 (presumption of correctness to state court findings of fact under 28 U.S.C. § 2254(d)).

the *Miranda* exclusionary rule. In fact, as this case demonstrates, independent federal review and relitigation of these matters relegates state courts to mere fact-finding and legal-ruling commissions, whose decisions are merely tentative and subject to ultimate review and resolution by the lower federal courts.

c. Appropriate Forum: The Interest in Judicial Economy

Given the primary role of state courts in our criminal justice system, and given the identical obligation of state and federal courts to apply constitutional principles, respect must also be due the state court as the most appropriate forum to resolve issues in the first instance. For example, regardless of whether the "custody" issue is deemed a question of fact or mixed question of law and fact,[9] the resolution of this issue in this case hinged in

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[9] The district court noted, without citing to any authority, that "the overall question of whether petitioner was in custody is a mixed question of fact and law which requires an *independent federal determination*." (Emphasis added.) Even assuming *arguendo* that the state finding was subject to the statutory presumption of correctness under 28 U.S.C. § 2254(d), the court summarily ruled that "this particular state court finding is so completely devoid of support in the record that the presumption is overcome. 28 U.S.C. § 2254(d)(8)." Contrary to established precedent, no explanation was provided for this alternative holding.

There is a split of authority among the circuits on the proper standard of review on the question of whether an individual is "in custody" within the meaning of *Miranda*, for those cases originating in federal court. *See, e.g., United States*

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substantial part on matters within the unique province of the state trial court. As this Court has observed, "determinations of demeanor and credibility . . . are peculiarly within a trial judge's province" and "were entitled to deference even on direct review; [t]he respect paid such findings in a habeas proceeding certainly should be no less." *Wainwright v. Witt*, 469 U.S. 412, 428 (1985) (citation omitted). In this case, the lower federal courts disrespected the state court's primary role in resolving these issues. At the suppression hearing, for example, the state trial court considered all the tapes and the testimony of respondent and the police officer involved. If the "custody" issue was a question of fact, *see* note 9, *supra*, neither the district court nor the Sixth Circuit explained

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v. Lennick, 917 F.2d 974, 977 (CA7 1990) (noting split); *United States v. Jorgensen*, 871 F.2d 725, 734 n.3 (CA8 1989) (Heaney, J., dissenting) (same).

In the absence of clear U.S. Supreme Court precedent, several courts, including the Sixth Circuit, treat the issue as a question of fact, subject to the deferential clear error standard. See *United States v. Lanni*, 951 F.2d 440, 443 (CA1 1991); *United States v. Carter*, 884 F.2d 368, 371 (CA8 1989); *United States v. Chalan*, 812 F.2d 1302, 1307 (CA10 1987), *cert. denied*, 488 U.S. 983 (1988); *United States v. Mahar*, 801 F.2d 1477, 1500 n.38 (CA6 1986); *United States v. Wauneka*, 770 F.2d 1434, 1438 (CA9 1985).

A few courts have treated this question as a mixed question of law and fact. *See United States v. Hocking*, 860 F.2d 769, 772 (CA7 1988); *United States v. Rioseco*, 845 F.2d 299, 302 (CA11 1988); *United States v. Calisto*, 838 F.2d 711, 717-18 (CA3 1988).

Finally, at least one circuit has reviewed the issue *de novo* as a question of law. *See United States v. Baird*, 851 F.2d 376, 379 (CADC 1988).

why the state court finding of fact was not entitled to the traditional presumption of correctness, contrary to established precedent. *See Sumner*, 449 U.S. at 549, 551; *see also Burden v. Zant*, 498 U.S. ___, 111 S.Ct. 862, 112 L.Ed.2d 962, 968 (1991); 28 U.S.C. § 2254(d).

Most importantly, such issues should be fully developed in the state court. To the extent that such factual questions are raised, "ensuring that full factual development of a claim takes place in state court *channels* the resolution of the claim to the *most appropriate forum*. The state court is the appropriate forum for resolution of factual issues in the first instance, and creating incentives for the deferral of fact finding to later federal-court proceedings can only degrade the accuracy and efficiency of judicial proceedings." *Keeney v. Tamayo-Reyes*, No. 90-1859, 60 U.S.L.W. 4339, 4341 (May 4, 1992) (emphasis added).

d. Intrusion into State Sovereignty Interests

At issue in every federal habeas proceeding is the enforcement of a state criminal law and a presumptively final state court conviction and sentence. As this case illustrates, the sovereign power of the States to enact substantive criminal laws is denied and frustrated pending federal resolution of habeas claims which have already been litigated. *See generally McCleskey v. Zant*, 499 U.S. ___, 111 S.Ct. 1454, 113 L.Ed.2d 517, 543 (1991); *Teague*, 489 U.S. at 309 (plurality opinion); *Stone*, 428 U.S. at 491 n.31.

In order to ensure that federal courts respect the State's sovereign interests, federal courts must first afford

state courts the opportunity to: (1) protect the integrity of their processes; (2) correct any errors in State proceedings; (3) apply independent State grounds for resolution; and (4) entertain in the first instance the enforcement of State substantive criminal laws. *See* notes 7 & 8, *supra*. However, even the operation of these accepted principles does not preclude the intrusion of federal courts into State sovereign matters. For example, sovereign interests were disregarded by the federal court here when it considered evidence which had already been suppressed under Michigan case law, consistent with the independent and adequate State ground doctrine. This use of limited federal judicial resources cannot be justified.

4. Interest in Finality

Each additional level of independent or *de novo* review to some extent disparages the prior proceeding and leaves the preceding judgment in an unsettled or temporary state. Until finality is attained, there can be no justice.[10] This is particularly true where, as here, a state court has considered a *Miranda* claim at the 1985 suppression hearing which has in turn been reviewed by the state

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[10] *See McCleskey*, 499 U.S. ___, 111 S.Ct. 1454, 113 L.Ed.2d at 542 ("Neither innocence nor just punishment can be vindicated until the final judgment is known."); *see also Teague*, 489 U.S. at 309 (plurality opinion); *Stone*, 428 U.S. at 491 n.31; *Mackey*, 401 U.S at 683, 690-91 (Harlan, J., concurring and dissenting); Friendly, *Is Innocence Irrelevant?*, at 147; Bator, *Finality in Criminal Law*, at 450-51; *accord In re Blodgett*, 112 S.Ct. 674, 116 L.Ed.2d 669, 674-75 (1992) (duty of federal habeas court to provide prompt resolution).

appellate court. Under these circumstances, a state court has done all it can do after it has reasonably and in good faith applied the law and rendered its findings of fact. *Cf. Butler*, 494 U.S. at ___, 110 S.Ct. at 1271; *United States v. Leon*, 468 U.S. 897, 918-19 (1984). Notwithstanding this expenditure of State judicial and prosecutorial resources and a presumptively final state conviction, repose has not yet been attained in this case, as all prior proceedings are still subject to resolution in this federal habeas corpus proceeding. *Duckworth*, 492 U.S. at 209 (O'Connor, J., concurring). Correspondingly, the rehabilitative interest of the criminal justice system is frustrated by this delay. *Sanders v. United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting).

5. Other Related Factors and Costs of Federal Habeas Review

The federal habeas corpus process taxes our criminal justice system in other significant ways. Duplicative litigation in federal court on identical issues, on which there was a full and fair opportunity to litigate in state court, consumes precious and limited judicial resources on collateral issues unrelated to guilt or innocence.[11]

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[11] *See Tamayo-Reyes*, No. 90-1859, 60 U.S.L.W. at 4341; *McCleskey*, 113 L.Ed.2d at 543 (noting "heavy burden on scarce federal judicial resources" which impacts the ability "of the system to resolve primary disputes"); *Stone*, 428 U.S. at 491 n.31 (noting impact of habeas review on "the most effective utilization of limited judicial services"); *Schneckloth v. Bustamonte*, 412 U.S. 218, 261 (1973) (Powell, J., concurring) ("After all, the resources of our system are finite: their overextension jeopardizes the care and quality essential to fair adjudication.").

In order to defend a presumptively valid state court judgment, *Barefoot*, 463 U.S. at 887, substantial State resources must be expended in the federal forum on habeas review, often years after the "main event," and may also be required for retrial in the event habeas relief is granted. The outcome and accuracy of a second state trial may turn on the reliability and availability of any remaining evidence. As Justice Harlan wrote, the "very act of trying *stale facts* may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first." *Mackey*, 401 U.S. at 691 (Harlan, J., concurring and dissenting) (emphasis added); *see also McCleskey*, 113 L.Ed.2d at 542; Friendly, *Is Innocence Irrelevant?*, 38 U. Chi. L. Rev. at 147.

Finally, perhaps the greatest social cost of all is the impact on public confidence in our criminal justice system, which is undermined by a process which countenances rounds of relitigation and accompanying delay. In discussing the habeas corpus process, Justice Powell wrote, "It is this paradox of a system, which so often seems to subordinate substance to form, that increasingly provokes criticism and lack of confidence." *Schneckloth*, 412 U.S. at 275 (Powell, J., concurring); *see also Stone*, 428 U.S. at 491 (noting concern over "generating disrespect for the law and administration of justice").

6. Conclusion

Against these substantial costs to our criminal justice system, which must be largely borne by the States, the sanction of the *Miranda* exclusionary rule on collateral review cannot be justified. As Judge Friendly has written,

"collateral attack on criminal convictions carries a serious burden of justification." Friendly, *Is Innocence Irrelevant?*, at 146. That burden cannot be met here. This Court should hold that the *Miranda* exclusionary rule, a judicially crafted remedial device, should not apply on collateral review, subject only to a showing that the petitioner was foreclosed from an opportunity to fully and fairly litigate this claim. *Cf. Stone*, 428 U.S. at 495 n.37.

7. Lower Federal Court Opinions

Respondent Williams may try to argue that lower federal courts have consistently refused to extend the *Stone* doctrine to *Miranda* claims. However, an examination of these decisions shows that lower federal courts have not given full consideration to the merits of this argument, simply deferring to the higher authority of this Court.[12] These early precedents have also not taken into account the more recent habeas jurisprudence of this Court, which has shown a unique sensitivity to the comity and federalism concerns implicated by the federal habeas corpus process.

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[12] For example, some courts have summarily declined, without full consideration, to extend the *Stone* doctrine to *Miranda* claims on habeas review. *See Patterson v. Warden*, 624 F.2d 69, 70 (CA9 1980) (per curiam) (summarily noting *Stone* "has not been so extended"); *Wilson v. Henderson*, 584 F.2d 1185, 1189 (CA2 1978), *cert. denied*, 442 U.S. 945 (1979).

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II. THE VOLUNTARINESS ISSUE

A. Unexhausted Claim

The application of the *Stone* standard to *Miranda* claims does not necessarily mean that federal habeas

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Other courts have questioned their ability to extend *Stone* to *Miranda* claims in light of prevailing U.S. Supreme Court or other precedent, concluding that the issue was best left for resolution by this Court. *See, e.g., DeAngelo v. Wainwright*, 781 F.2d 1516, 1518 (CA11) (expressing concerns over implicitly overruling *Miller v. Fenton*, 474 U.S. 104 (1985), providing for independent determination of the voluntariness of confessions), *cert. denied*, 479 U.S. 953 (1986); *Jarrell v. Balkcom*, 735 F.2d 1242, 1251 (CA11 1984) ("Despite [the] similarities [between *Miranda* and Fourth Amendment exclusionary rule claims], extension of *Stone* beyond its fourth amendment roots would be a major departure from established case law."), *cert. denied*, 471 U.S. 1103 (1985); *McCown v. Callahan*, 726 F.2d 1, 5 (CA1) (Because no court has extended *Stone* beyond the Fourth Amendment, "[p]rudence suggests that this controversial question be left, if possible, to the Supreme Court to decide."), *cert. denied*, 469 U.S. 839 (1984); *White v. Finkbeiner*, 687 F.2d 885, 890 & n.16 (CA7 1982) ("Clearly, even if we were so inclined, we have no authority implicitly to overrule or limit these Supreme Court decisions," including *Brown v. Allen*, 344 U.S. 443 (1953), permitting relitigation on federal habeas review of matters raised in state court), *vacated on other grounds*, 465 U.S. 1075 (1984); *Harryman v. Estelle*, 616 F.2d 870, 872 n.3 (CA5) (en banc) (noting the U.S. Supreme Court had an opportunity to reach this issue in *Brewer v. Williams*, 430 U.S. 387 (1977), but declined to do so), *cert. denied*, 449 U.S. 860 (1980); *Wilson*, 584 F.2d at 1189 (noting "Supreme Court has thus far carefully confined the effect of *Stone* to Fourth Amendment claims"); *United States ex rel. Henne v. Fike*, 563 F.2d 809, 812 (CA7 1977) (per curiam) (noting to date the U.S. Supreme Court had

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review would be unavailable for *all* claims predicated upon alleged involuntary confessions. *See, e.g., Teague*, 489 U.S. at 313-14 (noting habeas review should be available, *inter alia*, to consider claims "that the conviction was

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confined the *Stone* rule to Fourth Amendment claims), *cert. denied*, 434 U.S. 1072 (1978); *Berg v. Morris*, 483 F. Supp. 179, 184 n.3 (E.D. Cal. 1980) (noting the extension of *Stone* "is severely undermined by" recent Supreme Court decisions); *Cannistraci v. Smith*, 470 F. Supp. 586, 590 (S.D.N.Y. 1979) (noting other courts have not extended *Stone* outside the Fourth Amendment).

Other cases have merely concluded the issue was closed in light of prior circuit court precedent. *See, e.g., Hinman v. McCarthy*, 676 F.2d 343, 349 (CA9 1982) (citing brief *Patterson v. Warden*, 624 F.2d 69 (CA9 1980) (per curiam), *cert. denied*, 459 U.S. 1048 (1982)); *DeAngelo*, 781 F.2d at 1518 (citing *Jarrell v. Balkcom*, 735 F.2d 1242, 1251 (CA11 1984) (declining to extend *Stone* to *involuntary* confession claims, but noting similarity of *Miranda* and Fourth Amendment claims)).

In some cases, courts have found it unnecessary to resolve the issue as presented or disposed of the case on narrower or alternative grounds. *See Bunch v. Thompson*, 949 F.2d 1354, 1363 n.2 (CA4 1991); *White v. Finkbeiner*, 611 F.2d 186, 188-89 & n.9 (CA7 1979), *vacated on other grounds*, 451 U.S. 1013 (1981); *White v. Finkbeiner*, 570 F.2d 194, 200-201 & n.2 (CA7 1978); *Kennedy v. Pinkney*, 473 F. Supp. 1279, 1283 (C.D. Ill. 1979).

In other cases, courts have declined to consider the issue as improperly preserved for appellate review. *See Terrovona v. Kincheloe*, 912 F.2d 1176, 1179 n.9 (CA9 1990), *cert. denied*, 111 S.Ct. 1631 (1991); *Towne v. Dugger*, 899 F.2d 1104, 1111 n.3 (CA11 1990), *cert denied*, 111 S.Ct. 536 (1990); *Harryman*, 616 F.2d at 872 n.3; *Fike*, 563 F.2d at 812 (noting, *inter alia*, the "potentially far-reaching issue" had been raised belatedly as an afterthought).

based on a confession extorted from the defendant by brutal methods") (emphasis added) (citing *Rose*, 455 U.S. at 544 (Stevens, J., dissenting); *Miller v. Fenton*, 474 U.S. 104 (1985).

However, based upon the record before the Court, it may not be necessary to resolve this issue at this juncture. As a separate ground for relief, the district court held that *Mirandized* statements were induced by improper promises of leniency. Because this issue appears to have never been fairly presented in state court, this Court might decide to remand this aspect of the case for a determination on whether the voluntariness claim was properly exhausted. *See Castille v. Peoples*, 489 U.S. 346, 351 (1989) (noting "fair presentation" requirement); *Rose*, 455 U.S. at 518 (noting the exhaustion doctrine is "principally designed to protect the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings").

B. Merits

On the merits, *amici* defer in substantial part to the discussion of the voluntariness issue contained in the parties' briefs. If the Court decides to consider the merits of the voluntariness issue, the *amici* wish to emphasize that consideration of this claim in federal court for the first time places the State at a significant disadvantage. As this Court noted in *Miller*, "subsidiary factual questions" on the issue of voluntariness are entitled to the presumption of correctness under 28 U.S.C. § 2254(d). 474 U.S. at 112; *see also Elstad*, 470 U.S. at 318 (noting factual issues in determining whether a subsequent statement

after *Miranda* warnings was voluntary); *cf. Schneckloth*, 412 U.S. at 226 (noting voluntariness factors in Fourth Amendment context). Because this claim was never fairly presented to the state courts, the State of Michigan did not receive fair notice to defend against this claim. *See also Tamayo-Reyes*, No. 90-1859, 60 U.S.L.W. at 4341 ("It is hardly a good use of scarce judicial resources to duplicate factfinding in federal court merely because a petitioner has negligently failed to take advantage of opportunities in state-court proceedings.").

During the suppression hearing held in 1985, the state court had all the pertinent parties and evidence before it to consider any claim concerning the voluntariness of the respondent's statements. Where, as here, the respondent had every opportunity to litigate any potential claims of voluntariness in state court but failed to do so, the State should not be disadvantaged years later by being (1) required to marshal limited prosecutorial resources in federal court in order to defend the presumptively valid conviction, *or* (2) denied the opportunity to develop subsidiary facts in the state forum on an issue which would be entitled to the traditional presumption of correctness on federal habeas review. The record clearly establishes that the state court never denied respondent Williams a full and fair opportunity to litigate any claims of voluntariness had he decided to present them in state court. The anomaly is that if this case had instead arisen in the federal forum and respondent had failed to present the voluntariness claim, the claim may have been deemed waived under Fed. R. Crim. P. 12(f). *See United States v. Wilson*, 895 F.2d 168, 172-73 (CA4 1990); *see also United States v. Campbell*, 935 F.2d 39, 43-44

(CA4 1991), *cert. denied*, 112 S.Ct. 348, 116 L.Ed.2d 287 (1991). In contrast, the State of Michigan is compelled to expend further state resources in federal court on this issue more than seven years after the 1985 statements in issue.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the decision of the court below be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PAMELA WITHROW,

Petitioner,

—v.—

ROBERT ALLEN WILLIAMS, JR.,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF MICHIGAN IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union is a nationwide, nonpartisan organization with nearly 300,000 members, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The ACLU of Michigan is one of its statewide affiliates.

The ACLU has long worked to protect the rights of criminal defendants and their access to the federal courts and has filed many briefs, as direct counsel or as *amicus curiae*.

The warden's argument that Williams failed to exhaust Michigan state court remedies regarding the voluntariness claim is case-specific and will doubtless be addressed adequately by the parties. Accordingly, this *amicus* brief is limited to the warden's other contentions, which seek sweeping limitations on the rights of state prisoners with implications well beyond this particular dispute.

STATEMENT OF THE CASE

The respondent, Robert Allen Williams, Jr., was convicted of homicide in a Michigan state court and is now serving consecutive life sentences. Over his objection at trial, the prosecution was allowed to introduce statements he made to the police during interrogation at the station after Williams had been driven there in a police vehicle.

The officers told Williams that if he answered their questions, they would "check . . . out" his story, but that if he failed to cooperate they would "charge" him and "lock . . . [him] up." Petitioner's Appendix A at 3(a). In presenting Williams with this Hobson's choice, the police failed to observe the procedural safeguards man-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

dated by this Court in *Miranda v. Arizona*, 384 U.S. 436 (1966), to secure the Fifth Amendment privilege against self-incrimination.

Only after Williams made statements linking himself to the crime did the officers tell him that he was under arrest, and only then did they give him "*Miranda* warnings." Continuing the interrogation, the officers promised Williams that if he told them what had happened, he would not himself be charged. Petitioner's Appendix A at 5(a). Thereafter, Williams gave further incriminating statements.

The trial court concluded that "*Miranda* warnings" were unnecessary with respect to Williams' first statements, because the interrogation was not sufficiently "custodial" until the officers decided to place Williams formally under arrest. The state appellate court affirmed that disposition of the *Miranda* claim.

In federal habeas corpus, the district court recognized that the question whether Williams was in "custody" for purposes of *Miranda* did not turn on the formalities of arrest under state law. Applying this Court's precedents regarding the "custody" issue to the circumstances of this case, the district court concluded that Williams was in "custody" at the time he first gave incriminating statements in the absence of warnings. In addition, the district court held that Williams' subsequent statements were involuntary, and thus inadmissible under the Due Process Clause, largely because they were obtained in response to an explicit promise of leniency. The circuit court affirmed the district court's decisions on both issues. Petitioner's Appendix A at 17(a)-18(a).

In this Court, the warden argues: (1) that Williams failed to exhaust state remedies with respect to the voluntariness question; (2) that *Miranda* claims should not be entertained in habeas corpus if the state courts offered the prisoner an opportunity for "full and fair" litigation; (3) that Fifth Amendment privilege claims, as

distinguished from *Miranda* claims, should also be excluded from consideration in habeas corpus; and (4) that the circuit court's decision on the voluntariness issue depends on a "new rule" of law that is inapplicable in federal habeas corpus.

The parties dispute whether the warden conceded or waived the exhaustion issue below. The warden's argument that all *Miranda* claims, and, indeed, all Fifth Amendment privilege claims, should be excluded from federal habeas corpus was not raised until the district court had granted relief on the *Miranda* ground. The warden's final argument -- that even the involuntariness claim in this case should be excluded from habeas corpus because it depends on the application of a "new rule" -- was never raised at all below.

SUMMARY OF ARGUMENT

This is one in a series of cases in which this Court is being pressed to make wholesale cuts in the ability of the federal courts to enforce the Bill of Rights in federal habeas corpus. Unable to marshal the necessary votes in Congress to alter the federal courts' jurisdiction by statute, some state attorneys general, the United States Department of Justice, and allied private *amici* persist in asking this Court to give them the political victory they have been unable to achieve in the legislative branch -- and thus to legislate *for* Congress.

Twice within the past year, this Court has recognized the inappropriateness of this request. In *Stringer v. Black*, __ U.S. __, 112 S.Ct. 1130 (1992), and *Wright v. West*, __ U.S. __, 60 U.S.L.W. 4639 (1992), this Court noted that under the 1867 Habeas Corpus Act and a long line of precedents, the federal courts have both authority and responsibility to exercise independent judgment on the merits of properly preserved federal claims.

Now that the Court has declined to establish blanket limitations on the federal courts' authority with respect

to all claims raised in habeas corpus, the Court is being pressed here and in *Brecht v. Abrahamson*, No. 91-7358, *cert. granted*, 60 U.S.L.W. 3827 (June 8, 1992), to pare habeas corpus down, one set of claims at a time.

The path the Court is asked to take leads beyond *Miranda* to myriad other claims and cases and ultimately curves back to the sweeping propositions the Court has so recently deflected in *Wright v. West*, 60 U.S.L.W. 4639.[2] For example, the warden's argument in this case rests on two sweeping claims: first, that this Court can and should banish not only *Miranda* claims, but core Fifth Amendment privilege claims, and, indeed, all constitutional claims from federal habeas corpus; second, that the courts below announced a "new rule" of law when they invoked the conventional principle that confessions obtained by coercive methods are involuntary. Petitioner's Brief at 88; 97-98 n.66; 15-16 n.3.

The warden and the *amici* supporting her tell a misleading story about the history of modern habeas corpus, which largely ignores the paramount role that Congress has played and slides over decisions by this Court that refute their arguments.[3]

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[2] *See, e.g., Brecht v. Abrahamson*, 944 F.2d 1363 (7th Cir. 1991)(candidly proposing that the federal courts be forced to defer to state court judgments on the merits by the indirection of relaxing the harmless error rule in habeas corpus actions).

[3] For example, the Criminal Justice Legal Foundation (hereafter CJLF) ignores hotly contested debates regarding the meaning of classic precedents and blithely pronounces that the "older" cases are "squarely against" the rule that the federal courts exercise independent judgment regarding federal claims and that "recent developments" have established "substantial exceptions to *de novo* review." CJLF Brief at 2. Elsewhere, the CJLF acknowledges the argument, made by *amici* in *Wright v. West*, 60 U.S.L.W. 4639, that Congress codified *Brown v. Allen*, 344 U.S. 443 (1953), in 1966 when it enacted legislation that usually requires the federal courts to defer to state court findings of primary fact, but not to state court determinations of law (continued...)

The warden asks the Court to reinterpret the Habeas Corpus Act to exclude *Miranda* claims from the federal habeas courts' jurisdiction. That argument is refuted by the express terms of the Act, 28 U.S.C. §§2241-2255, and this Court's many precedents interpreting the Act.

Alternatively, the warden asks the Court to reinterpret *Miranda* itself to be unenforceable in habeas corpus. That argument is equally flawed. There is no analogy to the Fourth Amendment exclusionary rule. *Miranda* held that it is unconstitutional for the state courts to admit incriminating statements given in response to custodial interrogation without proof that effective safeguards were observed to avoid compulsion.

Miranda is not a judge-made rule of evidence, employed to vindicate a right having nothing to do with the criminal process. *Miranda* secures the privilege against self-incrimination, which is itself a rule of exclusion that protects the reliability and fairness of criminal trials. The violation in a Fourth Amendment case is complete when the police invade a citizen's privacy. The violation in a *Miranda* case is complete only when improperly obtained statements are used at trial -- undercutting the reliability and fairness of the fact-finding process.

Furthermore, the elimination of *Miranda* claims from habeas corpus would increase the time and effort the

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[3] (...continued)
or the application of law to fact. Yet rather than meeting that argument, the CJLF simply declares it "weak" and passes on to the entirely different argument that Congress' failure to enact restrictive legislation since 1966 indicates an acceptance of *Brown*. Moreover, the CJLF even mischaracterizes *that* argument by suggesting that "power brokers" in Congress are attempting to "divest" this Court of an ability to modify its own precedents. CJLF Brief at 9. That characterization grossly distorts the important point that Congress has repeatedly refused to limit the writ in the way the CJLF would have the Court limit it by its decision in this case. *See Wright v. West*, 60 U.S.L.W. at 4647 (O'Connor, J., concurring in the judgment).

federal courts devote to confession cases and generate additional friction with the states. If habeas petitioners were unable to raise *Miranda* claims in federal court, many would recast their arguments as Fifth Amendment or due process claims, compelling federal courts to face the same issues, but without the clarity provided by the *Miranda* rules.

The warden's argument that core Fifth Amendment claims -- indeed, all constitutional claims -- can unilaterally be jettisoned from habeas corpus is an affront to the jurisdiction conferred on the federal courts by Congress and this Court's many precedents respecting Congress' judgment.

The contention that the courts below improperly applied a "new rule" of law when it invoked the well-settled principle that involuntary confessions are inadmissible deeply mistakes the purpose and effect of this Court's recent decisions on the retroactive effect of changes in the law. This case involved only the determination of an ordinary "mixed" question of law and fact -- not an innovation in the controlling substantive legal standard.

ARGUMENT

I. UNDER APPLICABLE FEDERAL STATUTES, AS AUTHORITATIVELY INTERPRETED BY THIS COURT, A FEDERAL DISTRICT COURT PLAINLY HAS SUBJECT MATTER JURISDICTION IN HABEAS CORPUS TO ENTERTAIN A CLAIM THAT A STATE PRISONER'S CONVICTION RESTS ON A STATEMENT ADMITTED IN VIOLATION OF *MIRANDA v. ARIZONA*

The federal courts' jurisdiction in habeas corpus is conferred by the Habeas Corpus Act, 28 U.S.C. §§2241-2255, which establishes the power and duty to issue the writ on behalf of a prisoner who is "in custody in

violation of the Constitution or laws . . . of the United States."[4] This language admits no exceptions: claims grounded in federal law are plainly cognizable.[5]

Commentators debate the proper understanding of older cases, and it is scarcely necessary to tramp that ground yet again.[6] All sides concede that for the nearly forty years since *Brown v. Allen*, 344 U.S. 443, this Court has read §2241 to include all manner of federal claims.[7]

This Court has always declined to decide on its own that particular claims should be excluded from the habeas jurisdiction, but has respected the policy judgments made by Congress.[8] In *Berkemer v. McCarthy*, 468 U.S.

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[4] *Accord* 28 U.S.C. §2254(a)(restating the same jurisdictional grounds for cases in which state prisoners attack state criminal convictions).

[5] The CJLF offers a series of "purposes" it thinks might be served by federal adjudication of federal claims and attempts to rebut each one -- as though the scope of the federal courts' jurisdiction were not controlled by §2241 and this Court's longstanding interpretations of that statute. Passing on, the CJLF takes up various "proposals for modification" of habeas corpus and, "[l]ooking through this list," suggests, again, that this Court may fashion what policies it wishes regarding a jurisdictional matter the Constitution assigns to the legislative branch. CJLF Brief at 11, 15. Thus, the very approach the CJLF takes to this case reveals that it regards this Court as merely another political arena in which to pursue its political agenda. *Cf.* Brief of the Americans for Effective Law Enforcement and the National District Attorneys Association at 7 (admitting that the *amici* have long sought "legislation" to accomplish their goals and that, "[i]n the absence of such legislation," this Court's "continuing efforts . . . to achieve reform . . . is [sic] the criminal justice system's best hope . . . .").

[6] In *Wright v. West*, 60 U.S.L.W. 4639, Justice O'Connor noted numerous errors in the boilerplate occasionally used to summarize the development of the modern writ.

[7] *Wright v. West*, 60 U.S.L.W. 4639. Unable to deny that *Brown* stands in her way, the warden simply proposes that this fundamental precedent in habeas corpus law be overruled. Petitioner's Brief at 98.

[8] The CJLF asserts that the question whether the federal courts have (continued...)

420 (1984), the Court awarded relief on the merits of a *Miranda* claim. That holding included, as a necessary element, an authoritative interpretation of §2241 that placed *Miranda* claims within the federal courts' jurisdiction in habeas corpus.[9]

A. The Decision In *Stone v. Powell* Establishes No Precedent For Excising *Miranda* Claims From The Federal Courts' Jurisdiction

Nothing in *Stone v. Powell*, 428 U.S. 465, suggests that §2241 permits this Court to isolate selected claims and simply jettison them from the federal courts' jurisdiction. In *Stone*, the Court explained that it was merely continuing its modern elaboration of the Fourth Amendment exclusionary rule and concluding, as a step in the development of that rule, that it should not ordinarily be enforced in federal habeas corpus. *Allen v. McCurry*, 449 U.S. 90, 98 (1980). *Stone*, then, was not a case about the scope of habeas corpus; it was a case about the scope of the exclusionary rule. Justice Powell's opinion was explicit on this point:

> Our decision does not mean that the federal court lacks jurisdiction over . . . [an exclusionary rule] claim . . . .

Stone, 428 U.S. at 494 n.37.

This *had* to be true in *Stone*. If the decision largely to exclude Fourth Amendment claims from habeas corpus had been jurisdictional, the Court would have been unable to decide, at the same time, that Fourth Amendment claims could still be entertained if prisoners were denied an opportunity to raise them in state court. Yet that is precisely what the Court did decide. *Id.* at 494.[10]

This is not to say that the effect of *Stone* was blunted merely because that decision was based on an interpretation of substantive federal law rather than §2241. In the wake of *Stone*, the federal habeas courts have

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[8] (...continued)
jurisdiction to consider federal claims "should" be answered on an "issue by issue" basis. CJLF Brief at 2. That is *not* the way the habeas jurisdiction has been understood.

[9] There are also many cases in which this Court has denied relief on the merits. *E.g., Duckworth v. Eagan*, 492 U.S. 195 (1989); *Moran v. Burbine*, 475 U.S. 412 (1986); *Wyrick v. Field*, 459 U.S. 42 (1982)(*per curiam*). Recent precedents such as these cannot be set aside merely because the Court did not expressly address the possibility that the whole class of *Miranda* claims might be excluded from the habeas corpus jurisdiction. By reaching the merits the Court acknowledged that it had jurisdiction to do so. *See* 28 U.S.C. §1254 (pegging this Court's jurisdiction to review judgments rendered by the federal courts of appeals to the jurisdiction those courts exercise below).

In *Duckworth v. Eagan*, 492 U.S. 195, Justice O'Connor urged the Court to decide the case on the broader ground and suggested a jurisdictional basis for doing so. *Id.* at 213. The full Court responded with the notation that, since the warden had not argued for the extension of *Stone v. Powell*, 428 U.S. 465 (1976), to *Miranda* claims, it was unnecessary to decide that question. *Duckworth*, 492 U.S. at 201 n.3. If the Court had considered the *Stone* issue to be jurisdictional, it scarcely would have said that it could be put aside merely because a party had not raised it. Of course, *Stone* itself was not decided on a jurisdictional basis -- as we demonstrate below.

[10] The CJLF concedes that *Stone* had nothing to do with the breadth of the federal habeas jurisdiction, but argues that *Stone* nevertheless did two things: (1) it established that "*de novo* review is not required for all constitutional claims," and (2) it offered "criteria" for deciding whether other issues can be raised in federal court. CJLF Brief at 18. The first point is an obvious *non sequitur*. Since *Stone* was exclusively a Fourth Amendment case, it follows that *Stone* is irrelevant to the availability of the federal courts in cases involving other claims. Again, Justice Powell was explicit:

> [O]ur decision today is *not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally.

Stone, 428 U.S. at 494 n.37 (emphasis in original).

We address the CJLF's second argument below.

ceased to consider Fourth Amendment exclusionary rule claims at all. We are aware of few recent cases in which a federal court has held that a prisoner was denied an opportunity for state court litigation, such that a Fourth Amendment claim was open for federal examination.

Jurisdictional or not, *Stone* put the federal habeas courts out of the Fourth Amendment business. If the warden's view were accepted, the federal courts would be equally disabled in Fifth Amendment cases.

This case vividly illustrates the implications. The state courts erroneously thought that "custody" turned on the subjective intentions of the police and, accordingly, that *Miranda* was not triggered until the officers who questioned Williams decided to initiate formal arrest procedures. Yet in *Berkemer v. McCarthy*, 468 U.S. 420, this Court had explained that "custody" depends on the reasonable understanding of the suspect in the circumstances of a particular case. Clearly, then, Williams was in "custody" when he was taken to the station and told that he must answer questions or go to jail.

The state courts incorrectly ruled that Williams' statements were admissible, even though the police took no precautions whatever to avoid compulsion. Now, the warden insists that the federal courts have no authority to vindicate Williams' federal rights and must, instead, defer to the erroneous judgment rendered by the Michigan courts.

B. Recent Decisions On The Retroactive Application Of New Rules Of Law Support The Federal Courts' Authority To Hear *Miranda* Claims

This Court's recent decisions from *Teague v. Lane*, 489 U.S. 288 (1989), through *Stringer v. Black*, 112 S.Ct. 1130, fully support the jurisdiction of the federal courts to entertain ordinary *Miranda* claims. Those cases have only to do with a genuine change in the legal principle

applicable to a claim, announced after the case left state court. They do not restrict the authority of a federal court to apply settled law to the facts of particular cases.[11] Cases like *Saffle v. Parks*, 494 U.S. 484 (1990), do *not* stand for the revisionist proposition that the federal courts only review state judgments "to see if the state courts were unreasonable in their conclusion." CJLF Brief at 21. *Wright v. West*, 60 U.S.L.W. 4639 at 4647 (Kennedy, J., concurring in the judgment).[12]

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[11] If cases in the *Teague* line meant that ordinary *Miranda* claims were not within the habeas jurisdiction, then the Court in *Butler v. McKellar*, 494 U.S. 407 (1990), would hardly have been at pains to explain that the particular development in the *Miranda* framework on which the prisoner in that case relied had not occurred until after his conviction.

[12] Obviously, the district court did not invoke a change in the law when it held that Williams was in "custody" for *Miranda* purposes. The district court properly relied on *Berkemer v. McCarthy*, 468 U.S. 420, handed down on July 2, 1984 -- nine months before the police questioned Williams and more than a year before the state trial court acted. In *Berkemer*, the Court acknowledged that it might have chosen a legal standard for "custody" that would cover all traffic-stop cases. Thus, the Court might have held that "custody" always exists when a car is stopped, or that "custody" never exists until the police place a suspect formally under arrest. Instead, the Court located the definition of "custody" at a higher level of generality, knowing that other courts would have to exercise judgment in individual cases. *Cf. Wright v. West*, 60 U.S.L.W. at 4648 (Souter, J., concurring in the judgment). The test for "custody," then, is precisely the kind of standard that rarely generates "new rules" when it is invoked in analogous cases. *See id.* at 4647 (Kennedy, J., concurring in the judgment). Finally, there were no special facts here, such that reliance on *Berkemer*, 468 U.S. 420, can be characterized as the application of an old rule in a "novel setting," *id.*, or in circumstances that alter the "force" with which a principle operates. *Id.* at 4646 (O'Connor, J., concurring in the judgment).

C. Recent Decisions Excluding Claims For Procedural Reasons Also Support The Federal Courts' Power To Entertain *Miranda* Claims

This Court's cases foreclosing federal consideration of claims because of procedural default in state court ensure that the issues the federal courts entertain on the merits are presented in the proper procedural posture. Those decisions have nothing to do with the federal courts' authority to adjudicate the merits of claims properly before them. *Wainwright v. Sykes*, 433 U.S. 77, 87 (1977)(drawing this critical distinction).

Similarly, the cases largely foreclosing multiple petitions from a single prisoner clearly preserve the federal courts' jurisdiction to determine claims "presented in a proper procedural manner." *McCleskey v. Zant*, __ U.S. __, 111 S.Ct. 1454, 1462 (1991).[13]

D. There Is No Analogy To Cases Holding That Minor Flaws In Federal Trials Cannot Be The Basis Of Attacking Federal Convictions Collaterally

Decisions like *United States v. Timmreck*, 441 U.S. 780 (1979), have no bearing on the federal courts' authority and responsibility to entertain *Miranda* claims. *Timmreck* stands only for the unremarkable proposition that minor violations of the Federal Rules of Criminal Procedure cannot be the basis for challenging *federal* convictions collaterally by way of 28 U.S.C. §2255. If minor infractions *were* cognizable in §2255 proceedings,

[13] Here again, the CJLF slides over clear analytical distinctions between whole bodies of precedent, lifting any language that seems helpful to its cause without pausing to recognize the entirely different issues at stake in each context. CJLF Brief at 21 (drawing an unsupportable parallel between the *Teague* cases and cases on procedural default and successive federal petitions).

collateral review might be consumed by trivial complaints.

Since every claim a federal prisoner may have is a matter of federal law, wholly federal cases call for some dividing line between minor complaints of form that should be addressed only at trial or on direct review, on the one hand, and more "fundamental defects" of the caliber to warrant collateral review, on the other.[14]

In habeas corpus cases involving state prisoners, by contrast, there is no similar need or justification for distinguishing between technical claims and those of more substance. Rarely does a state prisoner have a federal claim that is not firmly anchored either in a provision of the Bill of Rights, such as the Fifth Amendment privilege secured by *Miranda*, or the Due Process Clause of its own force.[15] All such claims go to the fundamental validity of criminal convictions and, thus, to the validity

[14] *Hill v. United States*, 368 U.S. 424, 428 (1962). Stated literally, the description of cognizable claims provided by *Hill* is extremely narrow -- claims that reflect a "fundamental defect which inherently results in a complete miscarriage of justice." *Id.* But, of course, that description has never been *taken* literally, for the obvious reason that any error that results in a "complete miscarriage of justice" would violate due process. A working definition of the kind of *non*constitutional claims that can be considered in §2255 proceedings cannot sensibly exclude everything that is not of constitutional moment. *Cf. Davis v. United States*, 417 U.S. 333, 356 (1974)(squarely rejecting the argument that §2255 is limited to constitutional claims). In *Hill* itself, the claim was a violation of Rule 32(a); in *Timmreck*, it was a violation of Rule 11. Those claims provide the best illustrations of issues the Court has found insufficient to justify collateral review of federal criminal convictions. Needless to say, they are a far cry from *Miranda* claims, which go to the reliability of confessions, the integrity of the individual, and the adversarial structure of American criminal justice.

[15] It demeans the gravity of the contentions in this case for the CJLF to suggest that serious constitutional claims can be excluded from the jurisdiction of the federal courts simply because *pro se* prisoners may couch frivolous contentions in constitutional language. CJLF Brief at 11 n.3.

of prisoners' detention.[16] All such claims, accordingly, are cognizable in federal habeas corpus in the ordinary course.[17]

II. THE PROCEDURAL FRAMEWORK ESTABLISHED IN *MIRANDA* CANNOT BE REINTERPRETED TO BE ENFORCEABLE ONLY AT TRIAL OR ON DIRECT REVIEW

Unable to defeat Williams by depriving the federal habeas courts of subject matter jurisdiction to entertain his *Miranda* claim, the warden and supporting *amici* next attempt to defeat him through a reinterpretation of the substantive claim he seeks to vindicate.

In *Stone v. Powell*, 428 U.S. 465, this Court held that the Fourth Amendment exclusionary rule does not include as one of its elements a right to a federal writ of habeas corpus on the ground that the police obtained evidence through an unreasonable search or seizure. In this case, the warden asks the Court to hold that the framework established in *Miranda* for securing the privilege against self-incrimination does not include an ability to seek habeas relief on the ground that incriminating statements obtained in violation of *Miranda* were erroneously allowed into evidence at trial.

Simply stated -- and it is simply stated rather than argued -- the warden and her *amici* have it that, when it comes to habeas corpus, *Miranda* claims cannot be distinguished from Fourth Amendment exclusionary rule claims. Given *Stone*, they think their desired result in this case follows as a logical imperative. Petitioner's Brief at 88. On examination, however, *Miranda* claims are nothing like exclusionary rule claims in any respect that matters to habeas corpus.

A. It Is Misleading To Characterize *Miranda* As An Exercise In Nonconstitutional Judicial Law-Making

At the outset, the warden and other *amici* assert that the procedural safeguards established in *Miranda* are not themselves constitutional law, but a set of prophylactic rules fashioned by this Court to "over-protect[]" the Fifth Amendment privilege. Petitioner's Brief at 91. The United States, indeed, insists that the nonconstitutional character of *Miranda* provides the fulcrum on which the persuasive power of the analogy to *Stone* can be made to turn. Brief of U.S. at 8-9. This attempt to define *Miranda* out of habeas corpus is fundamentally flawed.[18]

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[16] The rationale of *Stone* is that Fourth Amendment exclusionary rule claims do not go to the fundamental validity of criminal convictions. *See* note 27 *infra*. By contrast, a defendant who is convicted on the basis of a confession obtained without the *Miranda* safeguards clearly *is* in custody in violation of federal law precisely because the conviction the state asserts to justify his detention clearly *is* rendered unlawful by the state's failure to safeguard the Fifth Amendment privilege.

[17] There is no basis for warden's argument that the federal "laws" to which the habeas statutes refer are necessarily statutes. Petitioner's Brief at 92-93. The very case on which the warden places so much emphasis, *Stone*, confirms that (in cases in which there was no opportunity for state court litigation) the federal habeas courts have jurisdiction to determine exclusionary rule claims, deemed in *Stone* to be a matter of federal nonconstitutional law. The *amicus* brief on behalf of some state attorneys general similarly neglects *Stone* in arguing that *Miranda* claims do not "meet the jurisdictional prerequisites for federal habeas review." Brief of Lungren, *et al.*, at 8. *Cf. Illinois v. Milwaukee*, 406 U.S. 91 (1972)(holding that suits pressing federal common law rights are actions "arising under" federal law within the meaning of 28 U.S.C. §1331).

[18] It is not apparent what mileage the warden and other *amici* hope to get from reducing *Miranda* claims to nonconstitutional status. Even if the safeguards established in *Miranda* were not in some instances (and in some sense) constitutionally compelled, it hardly would follow that the Court is free to take whatever free-wheeling direction a slim majority of sitting members might choose. Even decisions regarding judicially created rules are bound to respect the ordinary constraints that reasoned elaboration imposes on life-tenured judges.

Much of the *Miranda* framework *is* constitutional law, and this Court has never suggested otherwise. Prior to *Miranda*, some courts and commentators had taken the view that the privilege against self-incrimination only protected a citizen against being compelled to give evidence against himself in a judicial proceeding: both the compulsion and the use of the compelled testimony had to occur together. In *Miranda*, however, the Court held that compulsion and use may be separated in time and place: the Fifth Amendment bars the use of a compelled statement even if it was obtained previously in the course of custodial interrogation outside the court room. That holding was "constitutional." *Miranda*, 384 U.S. at 460-61.[19]

In addition, *Miranda* squarely held as a matter of constitutional law:

> [T]he prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.

Id. at 444.

Since this core constitutional decision in *Miranda*, the Court has only once held that the Fifth Amendment allows the use of a defendant's own statement as part of the prosecution's case in chief without *some* showing that *some* measures were taken to avoid compelling the defendant to incriminate himself.[20] In the absence of a "fully effective equivalent" framework, the familiar *Miranda* safeguards are constitutionally "required." *Id.* at 476, 479.[21]

Relief was granted in the cases before the Court in *Miranda* on the ground that "[i]n each instance . . . statements [had been] obtained . . . under circumstances that did not meet *constitutional* standards for the protection of the privilege." *Id.* at 491 (emphasis added).

As the warden correctly points out, this Court said in *Miranda* that the Constitution does not mandate any "specific code of procedures" for securing the privilege and invited state legislatures and Congress to develop alternatives, so long as they are "fully as effective" as the Court's own. *Id.* at 490. The Court also said that the statements at issue in that case were not necessarily "involuntary in traditional terms." *Id.* at 457.

Yet the conclusion the warden draws from the Court's statements in *Miranda* is plainly wrong. Given the unremarkable concession that a confession is not necessarily compelled in the Fifth Amendment sense if the prosecution fails to demonstrate each of the elements of the *Miranda* framework, the warden leaps to the proposition that compliance with the *Miranda* safeguards is entirely divorced from the constitutionality of a conviction obtained by violating them. By the warden's sights, this Court's careful opinion in *Miranda* was little more than an ambitious essay about what state prosecutors ought to show before introducing an incriminating statement at trial.[22]

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[19] The lion's share of Justice Harlan's dissent in *Miranda* was devoted to a criticism of the majority for "extending the Fifth Amendment's privilege against self incrimination to the police station." 384 U.S. at 510. *Accord Michigan v. Tucker*, 417 U.S. 433, 443 (1974)(reading *Miranda* to have decided for the first time that the constitutional privilege is "applicable to state interrogations at a police station").

[20] In *New York v. Quarles*, 467 U.S. 649 (1984), the Court recognized a (continued...)

[20] (...continued)
"public safety" exception in a case in which the police needed to ask questions in order to secure a loaded gun.

[21] *Accord Oregon v. Elstad*, 470 U.S. 298, 370-71 (1985)(Stevens, J., dissenting).

[22] By contrast, that case was a firm constitutional decision regarding (continued...)

The principal precedent cited in support of this revisionism is *Michigan v. Tucker*, 417 U.S. 433. *Tucker* involved an interrogation conducted before the *Miranda* decision had come down. Even without this Court's guidance regarding the precautions constitutionally mandated to avoid compulsion, the police had given the suspect most of the warnings *Miranda* would later require and specifically asked him whether he wanted an attorney. They failed only to tell the suspect that, if he could not afford to hire a lawyer, one would be provided for him free of charge. On that record, this Court was unwilling to hold that the statement the police obtained was compelled.

Tucker, accordingly, is perfectly consistent with the settled principle that effective safeguards are demanded constitutionally, but that a single departure from the *Miranda* framework may not, in some circumstances, render a confession constitutionally deficient. *Tucker* has nothing to say about cases like this one -- in which the police observed no safeguards at all during the custodial interrogation that produced Williams' initial statements. The line the warden attempts to draw between the flawed procedures employed in *Tucker* and the absence of procedures in this case ignores a distinction of constitutional dimension.

Moreover, *Tucker* did not rely on the nonconstitutional character of the error in that case to justify admitting the defendant's own statement -- as the warden hopes to justify the use of Williams' statements here. *Tucker* used its holding that the defendant's statement was not compelled in the constitutional sense only to distinguish *Wong Sun v. United States*, 371 U.S. 471 (1963), and, thus, to escape the fruit-of-the-poisonous-tree

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[22] (...continued)
what prosecutors are "required" to show to assure that the Fifth Amendment is to be "scrupulously honored." 384 U.S. at 479.

doctrine.

The statement that *Tucker* permitted the prosecution to introduce was given by a witness to whom the defendant's statement led the police. In *Tucker*, accordingly, the Court easily held that the defendant had not been compelled to be a witness against himself -- because the evidence in issue was given by a third party. In so holding, the Court expressly pointed out that the admission of the witness' statement in no way compromised the reliability of the fact-finding process at trial. For while flaws in the safeguards used in the interrogation of the defendant plainly would undercut the reliability of his statement, those violations could not draw into question the reliability of a statement freely given by another, not subject to the same interrogation.[23]

The warden's characterization of *Miranda* as a matter of nonconstitutional law is thus grossly misleading. In the run of *Miranda* cases, the use of a defendant's own statements obtained in the absence of warnings and waivers plainly violates the Fifth Amendment privilege against self-incrimination.[24]

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[23] This is the ground on which Justice White concurred in *Tucker*.

[24] This Court has repeated the statement that *Miranda* violations do not always implicate the Constitution in other cases -- but never in any manner critical to the result. In *Oregon v. Elstad*, 470 U.S. 298, the Court held only that a failure to comply with the *Miranda* safeguards initially does not forever bar further interrogation. Even at that, the Court emphasized that the circumstances of the interrogation in *Elstad* were not coercive. In *New York v. Quarles*, 467 U.S. 649, the Court candidly subordinated the constitutional values served by *Miranda* to the overriding public interest in safety.

B. *Miranda* Is Not A Judge-Made Evidentiary Rule And Cannot Be Treated In The Manner Of The Fourth Amendment Exclusionary Rule In *Stone v. Powell*

The characterization of *Miranda* as a court-fashioned evidentiary rule is equally misleading and, thus, cannot be analogized to the Fourth Amendment exclusionary rule interpreted in *Stone v. Powell*, 428 U.S. 465.

The exclusionary rule established in *Mapp v. Ohio*, 367 U.S. 643 (1961), has come to be understood by the Court not as a constitutional right in itself, but as a judicially created means of enforcing a constitutional right (the right against unreasonable search and seizure). The constitutional violation asserted in a Fourth Amendment case is committed when governmental agents violate the suspect's privacy. There is no necessary connection between such a constitutional violation and the criminal process. The officers alleged to have conducted an unreasonable search need not have been looking for evidence of crime, and the victim of their unconstitutional action need not be subject to criminal prosecution.

The link to the criminal process arises only because the purpose for which the police invade privacy is typically a search for criminal evidence and because, when evidence is found, the victim of the search is typically prosecuted. This being true, the Court has found it appropriate to deter future police misconduct by creating incentives to comply with the Fourth Amendment -- *i.e.*, by refusing to allow government to use the fruits of unconstitutional searches in some instances.

To decide when exclusion is appropriate, the Court has employed a cost/benefit analysis, which balances the deterrent value to be gained by excluding evidence from a particular setting against the costs of denying government (and the rest of us) the probative value of that evidence. Typically, the Court has struck the balance in

favor of admitting hard, reliable evidence of crime.[25]

The decision in *Stone* was only another decision in this line. The Court reasoned that when a habeas petitioner attacks his or her detention on the ground that the underlying conviction rests on evidence seized in violation of the Fourth Amendment, the prisoner is not asking the federal courts to upset a conviction obtained in violation of the Bill of Rights. Rather, the prisoner is seeking to use habeas corpus as an additional enforcement mechanism for a right the Court deems to have nothing necessarily to do with the regularity of, or the reliability attached to, the conviction.[26] Since the deterrent effects at the habeas stage may be diminished, the Court concluded that the costs of invoking the exclusionary rule in habeas outweigh its benefits.

Miranda, by contrast, *does* enforce an express provision of the Bill of Rights, which is itself a principle of exclusion having everything to do with the validity of criminal trials. The rule in *Miranda*, which prevents the prosecution from using a statement obtained in violation of procedures specified by the Court, flows from the underlying right those procedures vindicate: the right against being convicted on the basis of compelled testimony. The exclusion of evidence seized in violation of the Fourth Amendment is judicial policy, but the exclusion of compelled self-incrimination is constitutional law.

The violation in a *Miranda* case begins in the field when the police fail to comply with *Miranda* in taking a

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[25] *Compare Mapp v. Ohio*, 367 U.S. 643, with *United States v. Calandra*, 414 U.S. 338 (1974), and *Walder v. United States*, 347 U.S. 62 (1954).

[26] This is what Justice Powell meant in *Stone*, when he said that habeas petitioners ask for a redetermination of an issue that has "no bearing on the justice of [the prisoner's] incarceration." *Stone*, 428 U.S. at 491-92 n.31. It is why, indeed, a prisoner whose conviction was achieved on the basis of illegally seized evidence can be said *not* to be "in custody" in violation of federal law.

statement, but is complete only at trial when such a statement is used as part of the prosecution's case in chief. Evidence of that kind is excluded not to penalize a past violation, but to forestall a current violation of the Fifth Amendment.[27]

Thus, when a petitioner attacks his or her custody on the ground that a conviction rests on a confession obtained in violation of the *Miranda* framework, the prisoner raises a claim that *does* go to the procedural regularity, reliability, and integrity of the proceedings in state court that resulted in conviction. The warden and other *amici* unaccountably neglect this fundamental point.

The Court in *Miranda* explicitly stated that the framework it was putting in place was meant to ensure that criminal trials are reliable and fair. Previously, trial courts had excluded statements made to the police only after finding them involuntary under the Due Process Clause. That regime required vexing and time-consuming *ad hoc* inquiries into the peculiar facts of each case. Since the participants in interrogation sessions were typically limited to the suspect and the police, fact-finding hearings often degenerated into swearing contests in which suspects alleged coercive tactics and the officers involved denied them. Faced with conflicting testimony, trial courts typically could not find the

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[27] The purpose of *Miranda* cannot have been merely to prevent compulsion for its own sake. For compulsion alone does not violate the Fifth Amendment. This is plain from the cases permitting the government to compel witnesses to give testimony so long as their statements are not used as evidence in a criminal prosecution. *E.g., Kastigar v. United States*, 406 U.S. 441 (1972).

In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the Court recognized that while the rules announced in *Miranda* would affect the behavior of police in the field, the "basis of the decision was the need to protect the fairness of the trial itself . . . ." *Id.* at 240. There is, said the Court in *Schneckloth*, a "vast difference" between the rights guaranteed by the Fourth Amendment and rights, like *Miranda*, that "protect a fair criminal trial." *Id.* at 241.

facts reliably and, thus, could not decide the further, legal question whether, on the facts, a statement was voluntary. By instituting the relatively clean and crisp *Miranda* rules, and by placing the burden of demonstrating that those rules were followed on the prosecution, the Court meant to improve the ability of trial courts to make constitutionally significant judgments regarding the admissibility of testimonial evidence at trial. *Accord Minnick v. Mississippi*, __ U.S. __, 111 S.Ct. 486, 489-90 (1990).

This better mechanism for securing the Fifth Amendment privilege ensures more reliable results.[28] Compelled statements are often untrustworthy -- the product of physical or psychological pressures, threats, promises of leniency, or other coercive tactics. The *Miranda* rules eliminate or reduce the use of statements obtained in that way by instructing trial courts to receive confessions only if the prosecution carries its burden of proof regarding what went on at the police station.[29]

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[28] The United States states that the "prophylactic" rules established in *Miranda* "lead to the exclusion of highly probative evidence not obtained in violation of the Constitution." Brief of U.S. at 9. This is a *non sequitur*. It leaves the misleading impression that because *some* departures from *Miranda* may not undermine the reliability of statements, compliance with *Miranda* in general retards the pursuit of truth. In fact, *Miranda* enhances the truth-seeking function of criminal trials.

[29] The decision in *Johnson v. New Jersey*, 384 U.S. 719 (1966), to apply *Miranda* only prospectively does not undercut this point. *Johnson* did not deny that *Miranda* serves the interest of achieving reliable outcomes. Instead, the Court recognized that most procedural safeguards have something to do with reliability, and that the matter is typically one "of degree." *Id.* at 729. *Miranda* was denied retrospective effect not because it did not enhance the accuracy of outcomes, but because: (1) prisoners to whom *Miranda* claims would be denied could still raise due process voluntariness claims, and (2) the retroactive application of *Miranda* would have upset reliance interests and se-

(continued...)

The *Miranda* framework also safeguards the fairness of the criminal process. The Fifth Amendment privilege, which *Miranda* secures, rests on a constellation of values derived from Anglo-American history and implicated even when, on the basis of other evidence, it appears that a compelled statement expresses the truth. Among those values is the adversarial nature of our criminal process -- the body and soul of the constitutional scheme. The maintenance of the very structure of criminal trials is, of course, entirely different from the privacy interest in Fourth Amendment cases -- which, again, has nothing necessarily to do with the prosecution of criminal defendants and the validity of their detention.

Turning to the other side of the ledger, the costs of enforcing *Miranda* in federal habeas corpus are also distinguishable from the costs of enforcing the Fourth Amendment exclusionary rule. In order to protect privacy interests unrelated to the criminal process, the exclusionary rule announced in *Mapp* deprives the trial court of tangible evidence that may have relevance to the defendant's guilt. By contrast, *Miranda* enhances the system's ability to arrive at the truth through trustworthy and fair means. Statements are excluded because they have not been shown to be voluntary and reliable.

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[20] (...continued)
riously disrupted the administration of justice.

Nor does the decision in *Oregon v. Hass*, 420 U.S. 714 (1975), that statements obtained in violation of *Miranda* can be used to impeach a defendant's trial testimony, detract from *Miranda*'s purpose to ensure reliable results. *Hass* only ensures that *Miranda* will not be misused to frustrate, rather than to achieve, its own purposes. The idea in *Miranda* is to exclude statements that may be unreliable, not to allow a prisoner to contradict prior statements without the check that the introduction of previous utterances can provide in the search for truth.

C. The Elimination Of *Miranda* Claims From Habeas Corpus Would Only Add To The Federal Courts' Burdens And Generate Friction With The State Courts

The treatment of *Miranda* claims in habeas corpus in the way that *Stone v. Powell* treats Fourth Amendment exclusionary rule claims would produce none of the assumed benefits of *Stone* but would, instead, generate more and greater problems for both the state and the federal courts.

Stone purportedly addresses the concerns the Court has often expressed regarding habeas corpus: it utilizes the state courts for federal-question litigation, enhances the finality of state criminal judgments, reduces friction between the state and federal courts, and promotes federalism. *Stone*, 428 U.S. at 491 n.31.

Prisoners who claim that evidence used against them was illegally seized have no other federal ground to which they can repair; only egregious police practices can support a due process claim touching the production of hard evidence. *E.g., Rochin v. California*, 342 U.S. 165 (1952). In practice, then, *Stone* carves out of the federal picture claims about the way the police conduct searches and seizures.

Similar treatment of *Miranda* claims would not produce similar effects; instead, it would undermine the reliability of criminal convictions, compromise the current system of incentives addressed to state courts, and increase the litigation burden on the federal courts in habeas corpus.

If *Miranda* were not enforced in federal court, some percentage of the unreliable confessions *Miranda* was meant to prevent would be introduced into criminal trials and used to support invalid convictions. To argue that confessions in general are a *good* thing and, there-

fore, that failing to enforce *Miranda* in federal court is also good, *e.g.*, Brief of U.S. at 15-16, is to argue against *Miranda* itself -- in its every application.

Moreover, the elimination of *Miranda* claims from habeas corpus would, paradoxically, impair the finality of state judgments, increase friction between the two court systems, and undermine cooperative federalism. In contrast to *Stone*, prisoners with confession claims *would* have a fall-back position: namely, that the confessions used against them constituted compelled self-incrimination in violation of the Fifth Amendment, or coerced statements obtained in violation of due process.[30]

Charged to consider Fifth Amendment or due process claims, the federal courts would be forced to inquire into the circumstances of interrogations and criminal trials, and the precautions taken to avoid compulsion, but without the relatively clear guidance provided by *Miranda*. *See Minnick v. Mississippi*, 111 S.Ct. at 489-90.

To adjudicate such cases, the federal courts still would have to determine whether suspects were warned of their rights and whether, having been warned, they voluntarily agreed to cooperate. Those matters have always been held to be relevant to the voluntariness question on the open-ended "totality of the circumstances" standard. *E.g.*, *Haynes v. Washington*, 373 U.S. 503, 516-17 (1963); *see Miranda v. Arizona*, 384 U.S. at 534 (White, J., dissenting).

[30] Even the CJLF acknowledges that it would not be "proper" for the federal courts to defer to state court judgments on the voluntariness of confessions. CJLF Brief at 28.

In short, the federal courts would go on entertaining the same petitions from the same state prisoners, inquiring into the same facts in search of the same answers to the same questions. Denied the clarity of *Miranda*, however, they would take longer to decide cases and might well differ more often with the state courts over the proper conclusion to be reached in a case. All this would only take more time and effort, rub judicial feelings raw, and frustrate efficient justice in the bargain.

III. THE COURTS BELOW PROPERLY APPLIED THE SETTLED PRINCIPLE THAT THE DUE PROCESS CLAUSE BARS A STATE FROM PROCURING A CONVICTION ON THE BASIS OF INVOLUNTARY STATEMENTS OBTAINED FROM THE DEFENDANT THROUGH COERCIVE INTERROGATION TECHNIQUES, INCLUDING A PROMISE OF LENIENCY

The warden asserts that the courts below improperly applied a "new rule" of law when they held that the statements Williams made after receiving *Miranda* warnings were involuntary. *Cf. Teague v. Lane*, 489 U.S. 288. This conclusory proposition is merely stated, not argued, and, indeed, is offered only in a footnote -- which befits its station. Petitioner's Brief at 15 n.3.

There is nothing "new" about the proposition that coerced confessions are constitutionally inadmissible at criminal trials, by virtue of the Fifth Amendment or the Due Process Clause. In this case, the courts below relied on a long line of precedents stating and elaborating the "voluntariness" standard, beginning with *Bram v. United States*, 168 U.S. 532 (1897), and extending to Justice White's opinions in *Brady v. United States*, 397 U.S. 742 (1970), and *Arizona v. Fulminante*, __ U.S. __, 111

S.Ct. 1246 (1991). *See also Malloy v. Hogan*, 378 U.S. 1 (1964)(applying the Fifth Amendment privilege to state criminal prosecutions).

The "voluntariness standard" is the paradigm of a rule that "of necessity requires a case-by-case examination of the evidence" and thus infrequently yields a "result so novel that it forges a new rule . . . ." *Wright v. West*, 60 U.S.L.W. at 4647 (Kennedy, J., concurring in the judgment).

Certainly there is nothing unusual about the factual setting of this case, such that the "old" rule that confessions must be voluntary can be said to have been applied in a "novel" setting, *Stringer v. Black*, 112 S.Ct. at 1135, or in meaningfully distinguishable circumstances that altered the "force" of the "old" rule's underlying principle . . . ." *Wright v. West*, 60 U.S.L.W. at 4646 (O'Connor, J., concurring in the judgment). By contrast, this was a routine case, calling for straightforward judgment on the "mixed" question whether, on this record, the police coerced incriminating statements from this suspect.

If the warden had preserved the issue for this Court's consideration, she would have been free to argue that the courts below reached an erroneous decision on the merits of Williams' voluntariness claim. But there is no basis whatever to argue that federal consideration of the merits was foreclosed by this Court's decisions on the retroactive application of "new rules" of law.

The difference between these two arguments is precisely the difference this Court recognized in *Wright v. West*, 60 U.S.L.W. 4639. In truth, the warden in this case is attempting to reargue the point that was not sus-

tained in *West*, namely that the federal habeas courts create "new rules" of law every time they apply even well-settled legal standards to the facts of particular cases. As the opinions in *West* make clear, that is not the law.[31]

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[31] This may not be the last frivolous "new rule" argument this Court receives. Unfortunately, the accounts of "new rules" that have appeared in the Court's precedents to date fail to make it sufficiently clear that the *Teague* line of cases deals with genuine changes in the law. The difficulty lies primarily in the Court's recognition that state reliance interests may be upset not only when the federal habeas courts announce and apply a different abstract legal principle, but also when they invoke an established principle (particularly one stated at a high level of generality) in circumstances wholly different from those in which (and for which) the principle was created.

This latter formulation lacks predictive power and, indeed, invites state's attorneys to attach "new rule" arguments at the end of virtually any brief. The Court would better draw a clean, enforceable distinction between cases that articulate and apply new and different abstract legal standards (and thus "new rules"), on the one hand, and cases that apply settled abstract legal standards (and thus involve "mixed" issues), on the other. At the very least, the Court should expand upon what Justices O'Connor and Kennedy said in *Wright v. West*, 60 U.S. L.W. 4639, to explain when and how the application of old rules to different fact patterns genuinely creates new law. The warden's argument here proves that more is needed if decisions the Court meant to deal with the retroactive effect of genuine changes in the law are to be accurately understood and followed by the lower courts.

CONCLUSION

For the reasons stated above, the Court should affirm the circuit court's judgment.

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Supreme Court of the United States

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PAMELA WITHROW,

Petitioner,

vs.

ROBERT ALLEN WILLIAMS, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF AMICI CURIAE OF THE POLICE FOUNDATION ET AL. IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

This brief will address the following question:

Whether the rule of Stone v. Powell, 428 U.S. 465 (1976), should be extended to bar a federal court, when considering a petition for writ of habeas corpus from a state prisoner, from entertaining a claim that alleges that the introduction at trial of unwarned custodial statements violated Miranda v. Arizona, 384 U.S. 436 (1966).

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF AMICI CURIAE OF THE POLICE FOUNDATION ET AL. IN SUPPORT OF THE RESPONDENT

The police organizations, law enforcement officials, and former state and federal prosecutors listed on the

pages following the front cover submit this brief as amici curiae, pursuant to Rule 37 of the Court's rules, to assist the Court in determining whether the rule of Stone v. Powell, 428 U.S. 465 (1976), should be extended to apply to claims alleging that the admission at trial of unwarned custodial statements violated Miranda v. Arizona, 384 U.S. 436 (1966).[1] For the reasons stated herein, the Court should not extend the Stone rule to these claims.

STATEMENT OF INTEREST OF AMICI CURIAE

This brief is filed on the behalf of four police organizations, and fifty former state and federal prosecutors.

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[1] Counsel for both petitioner and respondent have consented to the filing of this brief.

The Police Foundation was established in 1970 by The Ford Foundation to improve policing and reduce crime in America through research, technical assistance, and communication. The Foundation played a pivotal role in the development of community policing, paved the way for the advancement of women in policing, and is breaking new ground with its comparative studies of large urban police departments. Foundation research on the use of deadly force was cited at length in Tennessee v. Garner, 471 U.S. 1 (1985). The Foundation provides technical assistance and training to government at all levels, as well as to private institutions concerned with public safety. In recent years, the Foundation has developed model programs designed to help municipalities improve relations between the police and

the community, adopt policies that foster cultural sensitivity, and reduce the use of excessive force by police.

The Police Executive Research Forum (PERF) is a national organization of law enforcement chief executives committed to promoting professionalism and advancing policing practices through research, experimentation, strong leadership and national debate. PERF members collectively serve more than 35 percent of the citizens in the United States.

The International Union of Police Associations (I.U.P.A.) is the AFL-CIO police union. The I.U.P.A. represents over 40,000 street-level police officers throughout the country in more than 200 law enforcement agencies.

The National Black Police Association (NBPA) is a nationwide organiza-

tion of Black police associations dedicated to the promotion of justice, fairness, and effectiveness in law enforcement. It has over 130 member associations representing more than 35,000 individual members, and has previously filed briefs in the Court on matters of significant importance to law enforcement. Cf. Tennessee v. Garner, 471 U.S. 1 (1985).

The fifty former prosecutors reflect an extraordinary breadth of experience in the trenches of our criminal justice system, and in the litigation of Fifth Amendment self-incrimination claims. Some have represented the interests of the United States in literally hundreds of hearings concerning the admission of custodial statements; others have sought the admission of such statements in state prosecutions in an equally large number of

cases. As a group, they possess a uniquely informed perspective on the importance of the enforcement of Miranda v. Arizona, 384 U.S. 436 (1966), in the state and federal courts.

Together, these organizations and individuals join their voices in urging the Court to resist the arguments of the State of Michigan and its amici, and to reject the extension of Stone to custodial statement claims.

SUMMARY OF ARGUMENT

Despite initial opposition, enforcement of Miranda v. Arizona, 384 U.S. 436 (1966), and its progeny in the state courts and the federal habeas corpus courts now enjoys widespread support in the law enforcement community. Miranda's enforcement has enhanced the reliability and integrity of the fact-finding process.

It must continue to be enforced in both the state courts and federal habeas corpus courts to prevent the unconstitutional imprisonment of citizens due to unreliable and coerced confessions.

The law enforcement community has seen the enforcement of Miranda and its progeny lead to an increased professionalism within police and sheriff's departments throughout the country. Miranda's bright-line rules have proven relatively easy to follow, have not hindered the process of securing voluntary custodial statements from suspects, and have sensitized police to Fifth Amendment commands. Prosecutors also find that issues of the admissibility of custodial statements have been simplified, and that juries have more confidence in statements secured after Miranda warnings.

Amici feel strongly that extending the rule of Stone v. Powell, 428 U.S. 436 (1976), to bar review of claims based upon Miranda and its progeny in federal habeas proceedings would send a disturbing message to the country and the law enforcement community, and would undermine the credibility of our criminal justice system. Many Americans view Miranda as a commitment to prevent intolerable police practices, and would view a bar to the review of Miranda claims in federal habeas proceedings as an abandonment of that commitment. The law enforcement community has no interest in seeing convictions based upon harmful Miranda violations go without legal remedy. In those instances where the state courts fail to provide such a remedy, federal habeas review should remain available.

ARGUMENT

I.

THERE IS SUBSTANTIAL SUPPORT IN THE LAW ENFORCEMENT COMMUNITY FOR MIRANDA AND ITS CONTINUED ENFORCEMENT IN HABEAS PROCEEDINGS BECAUSE IT PROTECTS THE RELIABILITY AND INTEGRITY OF THE TRIAL WITHOUT HARMING LEGITIMATE LAW ENFORCEMENT OBJECTIVES

A. Miranda's Purpose Was To Enhance The Reliability And Integrity Of The Fact-Finding Process

1. This Was The Purpose Of Miranda

For years prior to the decision in Miranda v. Arizona, 384 U.S. 436 (1966), the Court was concerned about the influence of coerced confessions upon the reliability and integrity of criminal trials. Miranda was fully in keeping with this longstanding concern. Thus, the Court's purpose in handing down Miranda was to protect the reliability and integ-

rity of the fact-finding process in criminal trials. As a later decision recognized, "the basis for [the Miranda] decision was the need to protect the fairness of the trial itself."[2]

In protecting the fairness of the trial, Miranda provides "important * * * safeguards against the use of unreliable statements at trial * * * ."[3] Thus, recognizing that the combination of custody and interrogation "contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely,"[4] the Court held that the Fifth Amendment's privilege

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2 Schneckloth v. Bustamonte, 412 U.S. 218, 240 (1973) (citing Miranda, 384 U.S. at 466).

3 Johnson v. New Jersey, 384 U.S. 719, 730 (1966).

4 Miranda, 384 U.S. at 467.

against self-incrimination applies to custodial interrogation conducted by the police.

The Court also concluded that in order to dispel the compulsion inherent in custodial questioning -- so that any statement secured from and used against a defendant is the product of his free will -- "protective devices" are needed.[5] In the absence of these protections, there is a "presumption of compulsion" that is "irrebuttable for purposes of the prosecution case in chief * * * ."[6]

The Court decided that the use by the prosecutor in his case in chief of such compelled statements would violate

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5 Id. at 458.

6 See Oregon v. Elstad, 470 U.S. 298, 307 (1985).

the Fifth Amendment privilege against self-incrimination, "the mainstay of our adversary system of criminal justice."[7] As the Court subsequently stated, coerced confessions not only deprive citizens charged with a crime of a central constitutional right, they also "may well be untrustworthy by their very nature."[8] Accordingly, when a state court considers an alleged Miranda violation in the first instance, and when a federal habeas court does so in post-conviction review, they are often considering a challenge to "the integrity of the factfinding process" of the state trial.[9]

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7 Johnson, 384 U.S. at 729.

8 See id.

9 See Brewer v. Williams, 430 U.S. 387, 414 (1977) (Powell, J., concurring).

2. The Enforcement Of Miranda Is Accomplishing This Purpose

Our experience as law enforcement officials and prosecutors convinces us that the enforcement of Miranda -- in the state courts, and where necessary in federal habeas proceedings -- has contributed substantially to effectuating the purpose behind Miranda, i.e., preventing convictions obtained through the use of compelled confessions. That Miranda's enforcement is having this positive effect has been widely recognized. As the Washington Post reported in June 1986:

> Supporters and opponents of the decision and subsequent modifications, agree that its enforcement has largely cured the problem the justices sought to overcome: lengthy and physically or psychologically brutal questioning by police used as a way to compel a suspect to confess to a crime.[10]

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10 See Nancy Lewis, 20 Years After Miranda, Police Say They've Learned to Live with Ruling;

(Footnote continued)

Moreover, the Special Committee on Criminal Justice in a Free Society, appointed by the American Bar Association's Criminal Justice Section and consisting of prosecutors, defense counsel, a police chief, law professors and a judge, concluded in November 1988, after (a) hearing testimony from police officers, prosecutors, defense attorneys and judges, (b) reviewing major criminal justice studies and (c) evaluating the result of a national telephone survey it commissioned, in which "over 800 defense lawyers, judges, prosecutors, and high ranking police administrators" were interviewed:

(Footnote 10 continued from previous page)
Early Outrage at Decision on Suspects' Rights Called "Overreaction", Wash. Post, June 13, 1986, (hereinafter "20 Years After"), at A4.

> Miranda has a very important symbolic value, reminding police officers of the limits of their authority over suspects. It has also helped to professionalize police departments and very likely to reduce the incidence of physically coerced confessions.[11]

As former FBI Section Chief Conrad V. Hassell has noted, state and federal court supervision of the interrogation process has had a dramatic and positive effect upon police agencies. "What Miranda did do, more than anything since the advent of the two-way radio in police cars, was to professionalize law enforcement."[12] He learned during his

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11 Special Committee on Criminal Justice in a Free Society of the American Bar Association Criminal Justice Section, Criminal Justice In Crisis (Nov. 1988) (hereinafter "ABA Special Committee Study"), at 2, 33-34.

12 Conrad V. Hassell, In Defense of Fairness: The Need for Miranda, The Police Chief, Dec. 1987, at 12.

many years of service at the Bureau that Miranda made police investigation

> more sophisticated. Forensic and behavioral sciences and the law of evidence were emphasized in police training academies. Law enforcement began the progression from skilled labor to a true profession, and much of the impetus for this massive reform came from the Miranda decision.[13]

This view is shared by local law enforcement officials as well. Former Boston Police Commissioner Francis Roache has noted that "Miranda made us more professional. It forced us to appreciate the Constitution. We now have great respect for people and we want to protect those rights."[14]

Moreover, our experience has taught us that the bright line rules of

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13 Id.

14 Police Chiefs Defend Miranda Against Meese Threats, Boston Globe, Feb. 5, 1987, at 25.

Miranda and its progeny have proven easy to follow. We wholeheartedly concur in the view of one prosecutor interviewed by the ABA Special Committee who stated that:

> Miranda * * * is a bright-line rule, easily understood, applied uniformly. We don't have any problem with it, and the police officers don't have any problem with it. [Miranda] is one of the great things you can have for a policeman. I have no problem with Miranda. * * * I think it has provided an appropriate level of warning to people who might not otherwise understand what their rights are.[15]

There is little question any longer that Miranda's enforcement has led to improvements, both within law enforcement agencies throughout the country, and in the reliability of the statements prosecutors present to juries when seeking convictions.

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15 ABA Special Committee Study, supra, at 30.

3. Federal Habeas Enforcement Of Miranda Is Vital To The Effectuation Of Miranda's Purpose

While Miranda and its progeny have had a significant and positive impact upon the law enforcement community's collection and use of statements, these cases must continue to be judicially enforced -- in both the state courts and federal habeas courts -- to prevent citizens from being unconstitutionally imprisoned because of unreliable and coerced confessions. Indeed, a brief survey of reported cases shows a significant number in which (a) the police have engaged in conduct that creates an irrebutable presumption of compulsion, (b) prosecutors have nevertheless introduced the resulting confessions

at trial, and (c) the state courts have upheld the ensuing convictions.[16]

In such cases, only the enforcement of Miranda in federal habeas corpus has secured the Fifth Amendment right that convictions not be brought about by unconstitutionally compelled confessions. Absent federal habeas corpus, this Court's resolve to end the use of confessions secured through compulsion would not have been effectuated. Since such cases continue to occur, federal habeas corpus review is necessary.

Collazo v. Estelle, 940 F.2d 411 (9th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 870 (1992), illustrates how essential federal habeas courts have been

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[16] We report only some of the cases we discovered where relief has been granted during the past five years.

when state courts have failed to provide a remedy for even outrageous police misconduct in securing statements. Writing for the full court in Collazo, Judge Trott found brazen, illegal police conduct that the state courts had not remedied. He identified in some detail the many police violations:

> Here, Officer Destro took unfair advantage of [the compelling pressures that can weigh upon a person in custody]. At a point where the law required him to back off, he did not "scrupulously honor" Collazo's right to cut off questioning; he stepped on it.
>
> * * *
>
> In this regard, Officer Destro's immediate interrogation of Collazo in direct response to his request for a lawyer is a textbook violation of Edwards.
>
> * * *
>
> What Officer Destro did can only be seen as badgering Collazo in the precise manner that concerned the Edwards Court.
>
> * * *

> Officer Destro's words are an egregious violation of Miranda -- the essence of improper law enforcement behavior in response to the rules established in that * * * landmark case.[17]

The court concluded that the admission of the coerced statement was not harmless, and, unlike the state courts, ordered the State "to retry the petitioner without using his taped statement."[18]

Equally egregious conduct by prosecutors has also been dealt with by the federal courts after the state courts have refused to provide a remedy. For example, in Cervi v. Kemp, 855 F.2d 702 (11th Cir. 1988), cert. denied, 489 U.S. 1033 (1989), Cervi was arrested in Iowa, and held on a Georgia murder warrant.

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17 Collazo, 940 F.2d at 417, 418 (citing Edwards v. Arizona, 451 U.S. 477 (1981)).

18 Id. at 426.

After Cervi requested to speak with counsel before proceeding with the hearing, a magistrate continued the hearing until the following day to allow Cervi to consult with appointed counsel. When appointed counsel arrived as scheduled to interview Cervi the following morning, the Iowa prosecutor and Georgia prosecutor refused to allow the meeting until Georgia authorities commenced and completed their interrogation. Both prosecutors were aware of Cervi's request for counsel but both took affirmative steps to block the meeting.

After the state courts found no violation, the federal appeals court found a straightforward violation of Edwards v. Arizona, 451 U.S. 477 (1981). That court concluded:

> Under these facts, the Edwards violation is clear. Cervi unequivocally invoked his right to counsel at the initial proceeding before the magistrate. He was in uninterrupted custody from that time until after he gave his incriminating statement. He did not in any way initiate the conversation that led to the statement. The Georgia authorities knew of Cervi's request for counsel prior to the time that he made his confession.[19]

Collazo and Cervi do not stand as solitary exceptions to otherwise full enforcement of Miranda by the state courts. Other obvious and harmful violations of Miranda and its progeny have frequently been remedied in federal habeas corpus after state courts have failed to provide relief. See, e.g., Christopher v. Florida, 824 F.2d 836 (11th Cir. 1987) (police repeatedly refused to honor asser-

[19] Cervi, 855 F.2d at 706.

tions of right to silence), cert. denied, 484 U.S. 1077 (1988); Smith v. Endell, 860 F.2d 1528 (9th Cir. 1988) (troopers ignored unambiguous requests of suspect for counsel), cert. denied, 111 S. Ct. 510 (1990); Desire v. Attorney General of California, 1992 U.S. App. LEXIS 15503 (9th Cir. July 10, 1992) (suspect asserted right to counsel and police told counsel client would not be interrogated; police then interrogated suspect, barred attorney from seeing client and prohibited suspect from calling attorney).[20]

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[20] Among other cases where relief from unconstitutional violations of Miranda and its progeny has been granted only in federal habeas corpus are Jacobs v. Singletary, 952 F.2d 1282 (11th Cir. 1992); Kordenbrock v. Scroggy, 919 F.2d 1091 (6th Cir. 1990) (en banc), cert. denied, 111 S. Ct. 1608 (1991); Robinson v. Borg, 918 F.2d 1387 (9th Cir. 1990), cert. denied, 112 S. Ct. 198 (1991); Towne v. Dugger, 899 F.2d 1104 (11th Cir.), cert. denied, 111 S. Ct. 536 (1990); United States ex rel. Espinoza v. Fairman, 813 F.2d 117 (7th Cir.), cert. denied, 483 U.S. 1010 (1987).

These cases plainly show that federal habeas corpus has been vital to the enforcement of Miranda rights and must remain available in the future.

B. Miranda's Continued Enforcement In Federal Habeas Will Not Harm Legitimate Law Enforcement Objectives

There is no question that when Miranda was first announced the law enforcement community responded overwhelmingly in a negative way. "The initial reaction of police and police officials was that it was the end of justice. * * * I'm sure it was overreaction, but we thought it was ludicrous, ridiculous, [and] that police would be handcuffed," recalled Montgomery County, Maryland, Police Chief Bernard D. Crooke.[21]

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[21] 20 Years After, supra, at A-4.

Yet in the subsequent twenty-five years, our view has changed, and changed dramatically. Professor LaFave speaks for many of us in saying "the Miranda solution hardly looks like an instance of overkill or an extremely liberal reaction to the problem."[22] Quoting former Deputy Attorney General Saltzburg in part, he continues:

> "Miranda is more of a compromise than most critics would care to admit," for it lies halfway between doing nothing to protect the fifth amendment privilege at the police station and protecting it fully by ruling "that before interrogation, a suspect must be warned of his rights by a magistrate and asked whether he wishes to waive them."[23]

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22 Wayne R. LaFave, Constitutional Rules for Police: A Matter of Style, 41 Syracuse L. Rev. 849, 858 (1990).

23 Id. (quoting Stephen Saltzburg, Miranda v. Arizona Revisited: Constitutional Law or Judicial Fiat, 26 Washburn L.J. 1, 21, 23 (1986)).

It is little wonder then that former Assistant United States Attorney Gerald M. Caplan, a vocal critic of the decision, has concluded that Miranda "has fallen into the mainstream and has been accommodated."[24]

Moreover, we now recognize that Miranda's dictates have rarely hindered the pursuit of truth in the courtroom. Police Chief Jim Davis of Portland, Oregon speaks for many in saying "we've had no problems with the Miranda ruling. We haven't found it to be a hamper or a hindrance in any way."[25]

This view is shared by others who have given the matter considered re-

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24 20 Years After, supra, at A-4.

25 Pete Yost, Police Chiefs Leader Supports Rollback of Miranda Ruling, Others Disagree, AP, Jan. 23, 1987 available in LEXIS, Nexis Library, AP File.

view. Professor Uviller, a long-time friend of law enforcement, concluded, after returning to the streets with the police during a several-month study, that "[w]hile Miranda may inhibit some exploitations of custody, it clearly leaves the police as free as ever to try every psychological ploy in the battle of wits to induce the suspect to furnish the evidence for his own conviction."[26] And the ABA Special Committee's 1988 Study reached the same conclusion:

> A very strong majority of those surveyed -- prosecutors, judges, and police officers -- agree that compliance with Miranda does not present serious problems for law enforcement. This conclusion taken together with earlier empirical studies assessing the impact of Miranda is

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26 H. Richard Uviller, Tempered Zeal: A Columbia Law Professor's Year on the Streets with the New York City Police, (Contemporary 1988) at 212.

> a strong repudiation of the claim that law enforcement would be greatly improved if Miranda was repealed or overruled.[27]

Indeed, many of us know from our years in the trenches that Miranda has actually assisted prosecutors, by aiding their efforts to show that statements taken from suspects were secured fairly and were not the product of heavy-handed measures. Problems of proof, as well as occasional doubts about whether officers were being candid and truthful in their description of interrogations, lessened with the advent of written advice cards and waiver forms that often included the suspect's signature. Rarely do prosecutors have to contend anymore with the problems of yesteryear. We completely

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27 ABA Special Committee Study, supra, at 28 (citations omitted).

agree with the statement of one prosecutor to the ABA Special Committee that "juries attach greater credibility to confessions that are obtained after Miranda warnings."[28]

Although some in law enforcement wish to see Miranda weakened or even reversed, recent criticism has come largely from politicians, not from prosecutors and police.[29] Surely, only a small minority want to see Miranda enforced less effec-

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28 ABA Special Committee Study, supra, at 29 (discussing prosecutor's views quoted at 29-30 of that study).

29 As Professor LaFave has observed:

"The Miranda bright line rules made it relatively easy for well-intentioned police to comply. This is why one seldom hears complaints about Miranda from police; these days, Miranda-bashing is largely confined to those trying to make political hay."

LaFave, supra, at 856 (footnote omitted).

tively, or continue to seek its outright demise.

Like most law enforcement officials, former Attorney General Griffin Bell supports the continued retention and enforcement of Miranda.[30] So do former Houston Police Chief, and current Police Commissioner in New York, Lee Brown,[31] and

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30 An ABA Journal article reported:

"As a practical matter, Miranda has been serving us well," says Griffin Bell, an Atlanta lawyer who was attorney general under President Jimmy Carter. "It protects our rights under the Fifth and Sixth Amendments, and I don't know of any better alternative. It is part of the American way of life now. Even the police don't want to do away with it. And I talked to quite a number of them [while at the Justice Department]."

Jonathan I.Z. Agronsky, Meese v. Miranda: The Final Countdown, A.B.A.J., Nov. 1, 1987, at 86, 88.

31 Mr. Brown does not see a need to lessen the enforcement of Miranda because he doesn't "see any detrimental impact" [from the decision]. Tamar Jacoby, Fighting Crime by the Rules: Why Cops Like Miranda, Newsweek, July 18, 1987, at 53.

former Newark Police Director Hubert Williams.[32] Their views are shared by prosecutors throughout the country.

It is little wonder, then, that those who have labored long to enforce our nation's Constitution and laws in an even-handed manner urge retention of the status quo, and that Miranda continue to be enforced fully. For example, then-United States Attorney for the Southern District of New York, Rudolph W. Guiliani, has supported Miranda and has cautioned, "I generally don't think we should change things unless there's a terribly good reason to do [so]. There's real benefit

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[32] "Officers want respect. • • • We've gotten away from force and coercion. Nor do we want to be accused of that." Why Cops Like Miranda, supra, at 53. Miranda has made it harder to level those charges.

in keeping things stable."[33] The Court would certainly be changing things without "a terribly good reason to do [so]" if, after all these years of the availability of federal habeas corpus review, it accedes to the view that Miranda is deserving of lesser protection.

II.

ENDING THE ENFORCEMENT OF MIRANDA IN FEDERAL HABEAS CORPUS WOULD SEND A DISTURBING MESSAGE, AND WOULD UNDERMINE THE CREDIBILITY OF OUR CRIMINAL JUSTICE SYSTEM

A decision declaring that Miranda rights can no longer be enforced in federal habeas proceedings would send a disturbing message to the public and to law enforcement, by guaranteeing that an unacceptable number of cases based upon

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[33] Burt Solomon, Meese Sets Ambitious Agenda That Challenges Fundamental Legal Beliefs, 17 Nat'l J. 2640 (Nov. 23, 1985).

harmful Fifth Amendment violations will go without any remedy.

A. The Abandonment Of Federal Habeas Enforcement Of Miranda Would Understandably Be Viewed As A Serious Blow To Liberty And Would Erode The Public's Confidence In Police And The Courts

For many Americans, Miranda has become a uniquely important symbol of freedom. Most people view Miranda as an emblem of the Court's forthright commitment to ensuring that "third degree" police practice would end, once and for all.[34]

A retreat in the Court's commitment to Miranda's enforcement would engen-

[34] Indeed, not long after the Court announced it would review this case, a newspaper in rural south Georgia published an editorial which alerted its readers that this case "could alter a landmark ruling," and urged the Court to retain the status quo and "uphold the Miranda Rule as a fair and reasonable criminal case procedure." Miranda Rule Is Safeguard, Waycross Journal-Herald, May 9, 1992, at 3.

der justifiable alarm. As many of our cities simmer, and as distrust of the police is tragically on the rise, a decision constraining the federal courts' power to remedy even blatant disregard of Miranda would understandably be recognized by many as a serious blow to liberty.

Former FBI Section Chief Hassell does not overstate the case when he says that "[i]t is still true that the quality of a society can be judged on how well it treats the least of its citizens. If we abandon Miranda, we will fail this test."[35] Judicial surgery removing Miranda from federal habeas jurisdiction will surely be viewed as abandonment of the Court's assurance that coercive police methods will not be countenanced,

[35] Hassell, supra, at 12.

Moreover, the ABA Special Committee was correct when it concluded that a lessening of the commitment to Miranda would send a disturbing message to the law enforcement community itself:

> Although it does little to impede the police in their investigations, Miranda has a very important symbolic value, reminding police officers of the limits of their authority over suspects.[36]

In our democratic society, it is essential that we never lose sight of the need for the enforcement of the Constitution with respect to police interrogation and confessions -- by both state and federal habeas courts. "Miranda correctly recognizes that the mere coincidence of custody and interrogation 'contains inherently compelling pressures which work to

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[36] ABA Special Committee Study, supra, at 33.

undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.'"[37] As Professor Uviller eloquently stated:

> The situation presents too easy and tempting an opportunity for the natural affinity of interrogation and torture to reassert itself in some form, however subtle. The notorious police appetite for a confession sometimes -- not invariably, but sometimes -- leads to oppressive exploitation of an inherently unequal situation.[38]

B. Our Criminal Justice System Would Lose Credibility If Serious Violations Of Miranda Could Not Be Remedied

If the ability of the federal courts to employ Miranda to overturn unconstitutional convictions resulting from

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[37] LaFave, supra, at 858, quoting Miranda, supra, 384 U.S. at 467.

[38] Uviller, supra, at 193.

coerced confessions is eliminated, the bright-line rules of Miranda will no longer be enforceable in all courts. Instead, the focus of federal habeas litigation concerning confessions will be the voluntariness test. Yet, under that test, the reliability and integrity of our criminal justice system will suffer, because, as Professor LaFave has pointed out:

> If we learned anything from the pre-Miranda exclusive reliance upon the voluntariness test, it was that a confession standard dependent upon a swearing contest between the police and defendant as to what occurred behind closed doors could not be relied upon to prevent police lawlessness.[39]

One result of a decision stripping Miranda claims from federal habeas courts would therefore be that there would

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[39] LaFave, supra, at 859 (citation omitted).

be people unconstitutionally convicted on the basis of tainted confessions who would remain unable to secure any judicial remedy at all. An example might be the case of William Alvin Smith (a/k/a "Noodle"), a retarded defendant who was convicted and sentenced to death largely on the basis of a confession he signed after hours of incommunicado interrogation.[40] Smith would have been able to understand his rights, if at all, only if the police had very slowly and carefully explained each right. Because the record failed to show that the police had explained his rights slowly enough so that Smith could understand them, the federal habeas corpus court held that the prosecution had not

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[40] See Smith v. Kemp, 664 F. Supp. 500 (M.D. Ga. 1987), aff'd, 887 F.2d 1407 (11th Cir. 1989) (en banc).

met its burden of showing a knowing and intelligent waiver of his Miranda rights. The court also concluded that the admission of the statement was harmful as to the jury's decision to impose the death sentence.[41] Under a less clearly defined standard, Smith might have secured no relief at all.

The integrity, as well as the reliability, of our criminal justice system would be tarnished by effectively telling the William Alvin Smiths of this country: "yes, your statement was introduced at trial in violation of Miranda, but you will be convicted -- or even executed -- because the state courts made a mistake and failed to grant you a new trial, and those are the only courts we

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41 Smith, 664 F. Supp. at 506.

will allow to consider your claim." Where such serious errors are not remedied in the state courts, the federal courts must remain free, in habeas proceedings, to grant relief.

Moreover, going back to the vague and undefinable "voluntariness" standard would make it more difficult to defend, in the federal courts, the admissibility of properly obtained statements. For these reasons, we urge the Court to preserve the status quo.

CONCLUSION

The Court should not extend the rule of Stone v. Powell, 428 U.S. 465 (1976), to bar a federal court, when considering a petition for a writ of habeas corpus from a state prisoner, from entertaining a claim that the introduction at

trial of custodial statements violated Miranda v. Arizona, 384 U.S. 436 (1966).

Dated: July 31, 1992

Respectfully submitted,

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Supreme Court, U.S.
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(10)

No. 91-1030

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PAMELA WITHROW,

Petitioner,

vs.

ROBERT ALLEN WILLIAMS

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

The American Bar Association, as *amicus curiae*, will address the following question:

Whether this Court should withdraw plenary federal habeas corpus jurisdiction from Fifth Amendment claims involving confessions compelled under the standards of *Miranda v. Arizona*, 384 U.S. 436 (1966).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1030

PAMELA WITHROW,

Petitioner,

vs.

ROBERT ALLEN WILLIAMS

Respondent.

INTEREST OF AMICUS CURIAE[1]

The American Bar Association ("ABA") is a voluntary membership organization of the legal profession dedicated to the promotion of a fair and effective system for the administration of justice. *See* ABA Const., art. 1, § 1.2. During the past decade, that dedication has led the ABA to make habeas corpus one of its highest priorities. In 1982, the Association adopted a comprehensive policy urging specific reforms in federal and state post-conviction procedures. In 1989, an ABA task force conducted an intensive study of death penalty habeas corpus reform. Based upon the task force's report and recommendations, the ABA in 1990 adopted, by an overwhelming margin, a comprehensive habeas reform policy. The ABA, on the basis of its policies, has frequently testified before both Houses of Congress considering reform of the habeas corpus statutes.

In 1982, the ABA House of Delegates opposed legislation that would have withdrawn federal habeas jurisdiction over

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk.

claims that had been fully and fairly adjudicated in state court. As the associated report of the Section of Criminal Justice noted, withdrawal of this jurisdiction would foster disparity and would "encourage violations of the Supremacy Clause." ABA, Section on Criminal Justice, Report on Habeas Corpus, at 35 (Aug. 1982).

In 1985, the ABA opposed similar legislation on the ground that elimination of this jurisdiction would leave federal rights unprotected and unenforced, and would destroy uniformity of federal constitutional principles. Statement of Phylis Skloot Bamberger on behalf of the ABA before the Comm. on the Judiciary of the U.S. Senate on S. 238, at 11-12 (Oct. 8, 1985).

In 1991, the ABA again opposed the repeal of federal habeas jurisdiction over claims that were fully and fairly adjudicated in the state courts. The ABA endorsed "the same principle" that

> has guided Congress' treatment of habeas corpus since the First Judiciary Act of 1789: *the federal habeas corpus remedy — for capital as well as noncapital prisoners — should be as broad as the fundamental individual rights that the federal Constitution confers.*

Statement of John J. Curtin Jr., President of the American Bar Association, and James S. Liebman, Professor of Law, Columbia University School of Law, on behalf of the American Bar Association before the Subcomm. on Civil and Constitutional Rights, Comm. on the Judiciary, U.S. House of Representatives, at 28 (July 17, 1991) (emphasis in original).

This Court has granted certiorari on the question whether a particular class of claims, those based on *Miranda v. Arizona*, 384 U.S. 436 (1966), should be stricken from federal habeas corpus jurisdiction when the claims have been fully and fairly adjudicated in state court. This question implicates the ABA's long-standing policy to support preservation of independent review of state court convictions on federal habeas corpus.

SUMMARY OF ARGUMENT

Congress has set the bounds of federal habeas corpus jurisdiction broadly. This jurisdiction includes claims of all varieties of unconstitutional custody. 28 U.S.C. §§ 2241(c)(3), 2254(a). The petitioner and some of her *amici* are wrong to suggest that this Court is free to repeal the jurisdiction that the legislature has conferred. As the Court stated just last year, reaffirming long-settled principles, "the writ today appears to extend to all dispositive constitutional claims presented in a proper procedural manner." *McClesky v. Zant*, 111 S. Ct. 1454, 1462 (1991).

The Court's decision in *Stone v. Powell*, 428 U.S. 465 (1976), which balanced the costs against the benefits of enforcing the Fourth Amendment exclusionary rule on collateral attack, is not to the contrary. The Court in *Stone* explicitly reaffirmed settled principles of habeas corpus jurisdiction, and claimed no authority to reshape the jurisdiction that Congress has established. Instead, the Court stressed the differences between the Fourth Amendment exclusionary rule and constitutional rights that protect a defendant's right to a fair trial under our accusatorial system, including rights under the Fifth and Sixth Amendments. The Fourth Amendment exclusionary rule, the Court said, serves no other significant purpose than to deter the police generally from committing future Fourth Amendment violations against other people. On this view, a defendant who has been convicted upon illegally seized evidence is not thereby in custody unconstitutionally.

In *Stone* and later decisions, the Court repeatedly has distinguished the Fourth Amendment exclusionary rule, which does not protect a defendant's trial rights, from constitutional rules that do, including rules announced in *Miranda v. Arizona*, 384 U.S. 436 (1966).

In *Miranda*, the Court recognized that compulsion is inherent in custodial interrogation, and that secrecy usually surrounds it. To protect a defendant's Fifth Amendment rights in this setting, the *Miranda* Court created, and required the lower courts to observe, a conclusive presumption of compulsion unless specified procedures were followed, including administration of the familiar warnings. The foremost purpose of this evidentiary requirement is to protect the Fifth Amendment rights of the defendant who invokes it, for the Court concluded that custodial interrogation in the absence of warnings very likely *is* coercive, even when the secrecy of incommunicado questioning prevents more direct proof.

The sort of balancing that the Court conducted in *Stone v. Powell* is, therefore, misplaced here, because a state prisoner who has been convicted upon a confession admitted in violation of *Miranda* is in custody in violation of the Constitution.

But even if it were open to this Court to balance the costs and benefits of retaining habeas jurisdiction over *Miranda* claims, that jurisdiction should be retained. The benefits are substantial. A defendant convicted upon a confession admitted in violation of *Miranda* has been convicted upon his own compelled testimony. The defendant has not received a fair trial. The habeas corpus remedy serves its core purpose — providing relief from unconstitutional custody.

The marginal costs are comparatively slight. Excluding *Miranda* from habeas jurisdiction will not exclude confession claims, which will continue to be made, but under the more complex, burdensome, and unclear voluntariness standards of the due process clause. Federal-state friction will continue, and the finality of convictions will be placed in greater doubt, if federal habeas courts are instructed to discard the comparatively clear-cut *Miranda* rules.

The substantial differences between *Miranda* and the Fourth Amendment exclusionary rule make this case and *Stone v. Powell* far different and require a different result here.

ARGUMENT

I. THE FEDERAL COURTS ARE REQUIRED TO HEAR PROPERLY PRESENTED CLAIMS OF UNCONSTITUTIONAL CUSTODY.

"Jurisdiction over applications for federal habeas corpus is controlled by statute." *Brown v. Allen*, 344 U.S. 443, 460 (1953). In 28 U.S.C. §§ 2241(c)(3) and 2254(a), Congress has conferred federal jurisdiction over properly preserved and presented claims that prisoners are "in custody in violation of the Constitution or laws or treaties of the United States." To withdraw this jurisdiction is a legislative not a judicial prerogative, for, as the Court has said, the federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

We respectfully submit that the Court is not free, as petitioner and some of her *amici* suggest, to withdraw whole categories of constitutional claims from habeas jurisdiction — whether the claims derive from *Miranda v. Arizona*, 384 U.S. 436 (1966), or any other source. A long and unbroken line of cases stands against the idea that the federal courts are free to sort constitutional claims into those that are "worthy" to be entertained on federal habeas corpus, and those that may be ignored as somehow "unworthy." In *Brown v. Allen*, the Court observed that "[d]ischarge from conviction through habeas corpus is not an act of judicial clemency," which the courts are free to extend or withdraw as they choose. Rather, it is "a protection against illegal custody." 344 U.S. at 465.

Just last year, in *McClesky v. Zant*, 111 S. Ct. 1454 (1991), the Court stated that "[w]ith the exception of Fourth Amendment violations that a petitioner has been given a full and fair opportunity to litigate in state court, the writ today appears to extend to all dispositive constitutional claims presented in a proper procedural manner." *Id.* at 1462 (citing *Stone v. Powell*, 428 U.S. 465, 495 (1976), *Brown v. Allen*, 344 U.S. 443 (1953),

and *Wainwright v. Sykes*, 433 U.S. 72, 79 (1977)). In *Sykes*, the Court noted that *Brown* "made explicit that a state prisoner's challenge to the trial court's resolution of dispositive federal issues is always fair game on federal habeas." 433 U.S. at 79. These statements accord with the historical understanding of the writ, and with the Court's undeviating practice since its 1953 decision in *Brown v. Allen*.[2]

This was the Court's clear understanding in *Brown v. Allen*. Justice Reed's opinion for the Court addressed four sets of preliminary issues: exhaustion of state remedies, 344 U.S. at 447-50; the effect of a prior denial of certiorari, *id.* at 456-57; deference to state court factual determinations, *id.* at 458; and the circumstances when a federal habeas court should hold a new "trial" on the facts, or when it may dispose of the petitioner's claims upon the state court record. *Id.* at 460-65.

What is most striking, in light of the arguments that petitioner and her *amici* now make, is that after treating these procedural issues, Justice Reed's opinion did not even question

[2] A number of decisions prior to 1953 indicated that the writ was unavailable to a state prisoner who had received a full and fair hearing in the state courts, but these decisions reflected the more restricted view of their era of the content of due process of law under the Fourteenth Amendment. "[W]ith rare exceptions, there were no other federal claims [than the denial of a full and fair hearing] available at the time." *Wright v. West*, 112 S. Ct. 2482, ___ (1992) (O'Connor, J., concurring). Consequently, even before *Brown v. Allen*, available constitutional claims were cognizable on federal habeas corpus.

Stone v. Powell does not mark a departure from this view. *Stone* was based, not on a contrary view of the scope of federal habeas corpus jurisdiction, but on a particular view of the Fourth Amendment exclusionary rule. *See* pp. 9-12, *infra*. Indeed, Justice Powell, the author of the Court's opinion in *Stone*, later reaffirmed that habeas corpus "permits the federal courts . . . to vacate a final conviction on *any* properly preserved ground of federal constitutional error." *Solem v. Stumes*, 465 U.S. 638, 653 (1984) (Powell, J., concurring) (emphasis supplied).

whether properly preserved constitutional claims were within federal habeas corpus jurisdiction. The opinion noted that "[q]uestions of discrimination and admission of coerced confessions lie in the compass of the Due Process and Equal Protection Clauses of the Fourteenth Amendment." *Id.* at 466. Because the petitioners had stated and preserved claims of unconstitutional custody, the Court undertook a 22-page analysis of the merits. *Id.* at 466-87. Nowhere did Justice Reed's opinion evidence the slightest doubt about the federal courts' obligation to decide the merits of properly preserved and presented federal constitutional claims.

Justice Frankfurter's opinion for a majority of the Court did not question that habeas jurisdiction extended to claims of any stripe of unconstitutional confinement:

> It is for this Court to give fair effect to the habeas corpus jurisdiction as enacted by Congress. By giving the federal courts that jurisdiction, Congress has imbedded into federal legislation the historic function of habeas corpus adapted to reaching an enlarged area of claims. . . .
>
> . . . [T]he prior State determination of a claim under the United States Constitution cannot foreclose consideration of such a claim, else the State court would have the final say which the Congress, by the Act of 1867, provided it should not have. . . .

Id. at 499-500 (Frankfurter, J., concurring). Nowhere did Justice Frankfurter suggest that there was a distinction between "worthy" and "unworthy" constitutional claims, or that the Court was free to allow the states the last word on those deemed somehow "unworthy."

In the period between the decision in *Brown v. Allen* in 1953, and the amendment and recodification of the habeas statute in 1966, the Court held all variety of constitutional claims to be cognizable. Not once did the Court express doubt that federal habeas jurisdiction extends to every strain of un-

constitutional custody.[3] Just a few months before the 1966 enactment, the Court stated positively of defendants in a state court prosecution that "[i]f at their trial they are in fact denied *any* federal constitutional rights, and these denials go uncorrected by other courts of the State, the remedy of federal habeas corpus is freely available to them." *City of Greenwood, Mississippi v. Peacock*, 384 U.S. 808, 829 (1966) (emphasis supplied).

In 1966, Congress revised and recodified the habeas statute. Act of Nov. 2, 1966, Pub. L. 89-711, 80 Stat. 1104 (1966). In § 2, the act inserted the present paragraph (a) in 28 U.S.C. § 2254, which provides that a federal court shall entertain a petition by a prisoner under a state court sentence "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." This language reproduced language from 28 U.S.C. § 2241, which was the basis for the Court's consistent holdings that the remedy of federal habeas corpus is available for claims of every sort of unconstitutional custody. Congress's purpose in preserving and reenacting this language is plain: to preserve habeas jurisdiction over all manner of claims of unconstitutional custody.[4]

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[3] *See, e.g., Sheppard v. Maxwell*, 384 U.S. 333 (1966) (pre-trial publicity); *Pate v. Robinson*, 383 U.S. 375 (1966) (incompetence to stand trial); *Boles v. Stevenson*, 379 U.S. 43 (1964) (per curiam) (procedures to determine voluntariness of confession); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Rogers v. Richmond*, 365 U.S. 534 (1961) (involuntary confession); *Douglas v. Green*, 363 U.S. 192, 193 (1960) (equal protection clause claim by indigent who could not afford docket fee to appeal; "Clearly federal habeas corpus is an appropriate remedy under these circumstances."); *United States ex rel. Jennings v. Ragen*, 358 U.S. 276 (1959) (coerced confession); *Massey v. Moore*, 348 U.S. 105 (1954) (incompetence and right to counsel); *Leyra v. Denno*, 347 U.S. 556 (1954) (coerced confession).

[4] Indeed, the Court indicated as much in *Neil v. Biggers*, 409 U.S. 188 (1972). There the Court held that 28 U.S.C. § 2244(c), which also was enacted in the 1966 legislation, did not bar the habeas petition of a prisoner whose conviction this Court had affirmed on direct appeal by an equally divided vote. 409 U.S. at 190-92. The Court concluded that Congress intended to codify prior judicial limitations on successive rounds of federal court review of state convictions, but "without endangering the principle that each [prisoner] is entitled, other limitations aside, to a redetermination of his federal claims by a federal court on habeas corpus." *Id.* at 191.

Last term, in *Ankenbrandt v. Richards*, 112 S. Ct. 2206 (1992), the Court employed similar reasoning in concluding that Congress had acquiesced in prior judicial constructions of federal diversity jurisdiction, when it reenacted the jurisdictional statute, 28 U.S.C. § 1332. 112 S. Ct. at 2213. The same reasoning applies in the present case, with even greater force.[5] Further, as the Court said in *Ankenbrandt*, "[c]onsiderations of *stare decisis* have particular strength in this context, where 'the legislative power is implicated, and Congress remains free to alter what we have done.'" *Id.* (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989)).

II. STONE V. POWELL, 428 U.S. 465 (1976), DID NOT CARVE AN EXCEPTION OUT OF FEDERAL HABEAS CORPUS JURISDICTION OVER CLAIMS OF UNCONSTITUTIONAL CONFINEMENT.

In *Stone v. Powell*, 428 U.S. 465 (1976), the Court did not revoke any of the jurisdiction that Congress has conferred over claims of unconstitutional imprisonment. *Stone* concerned the scope and meaning of the Fourth Amendment exclusionary rule, as applied to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961). *Stone* was not a case about habeas corpus, as such. The

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[5] Justice Blackmun, in his concurrence in *Ankenbrandt*, took issue with the majority's recognition of a diversity jurisdiction exception for domestic relations actions, on the historical evidence presented there. *Id.* at 2217 (Blackmun, J., concurring). Justice Blackmun's objections in that case are inapplicable here, where the plain meaning of the statute and the historical record are both in accord that federal habeas jurisdiction extends to all claims of unconstitutional custody.

Court stressed that it was not deciding any question of "the statutory scope of the habeas corpus statute," *id.* at 482 n.17, and it was not refusing Congress's grant of jurisdiction:[6]

> Our decision today is *not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally. . . . [W]e emphasize the minimal utility of the [exclusionary] rule when sought to be applied to Fourth Amendment claims in a habeas corpus proceeding. . . .

Id. at 494 n.37 (emphasis in original).

As the Court described it, the *Mapp* rule "is not calculated to redress the injury to the privacy of the victim of the search or seizure, for any '[r]eparation comes too late.'" *Id.* at 486 (quoting *Linkletter v. Walker*, 381 U.S. 618, 637 (1965)). It "is a judicially created remedy rather than a personal constitutional right . . . ." *Id.* at 494 n.37. Indeed, the Court said that "Fourth Amendment violations are different in kind from denials of Fifth or Sixth Amendment rights," for they do not "'impugn the integrity of the fact-finding process . . . .'" *Id.* at 479 (quoting *Kaufman v. United States*, 394 U.S. 217, 224 (1969)).

The *Stone* Court's theory of the Fourth Amendment exclusionary rule implies that persons convicted on illegally seized evidence are not thereby "in custody in violation" of the Fourth Amendment.[7] Indeed, the *Mapp* rule, as viewed in *Stone*, is an anomaly in the adversarial process in criminal cases. Illegally seized evidence is excluded solely to deter (or refuse to encourage) future illegal seizures. The intended beneficiaries of exclusion are those who, but for the deterrent effect of exclusion, would be victimized by illegal searches and seizures in the future. The criminal defendant who actually moves to suppress the evidence is, at best, a necessary but incidental beneficiary.

[6] The dissents submitted that the majority in *Stone* was improperly cutting into habeas corpus jurisdiction, a suggestion that the Court rejected. *Id.* at 536 (White, J., dissenting); *id.* at 515 (Brennan, J., dissenting).

[7] In another context, the Court observed in *New York v. Harris*, 495 U.S. 14 (1990), that a Fourth Amendment violation in the form of a warrantless entry into a home does not "somehow render[] unlawful continued custody of the suspect" who is arrested inside. *Id.* at 18. If the police have probable cause to arrest, the suspect is "not unlawfully in custody when he [is] removed to the station house . . . ." *Id.* Similarly, under a deterrence-based exclusionary rule, an antecedent Fourth Amendment violation does not render unconstitutional the defendant's custody under a sentence imposed after an otherwise lawful conviction.

On this view of *Mapp*, the Court in *Stone* concluded that it was free to balance the benefits against the costs of enforcing that rule in federal habeas corpus proceedings. The Court was undertaking "[t]he same pragmatic analysis of the exclusionary rule's usefulness in a particular context," *id.* at 488, as in a long line of cases decided before,[8] since,[9] and at the same time as *Stone*.[10] The Court concluded that no significant additional deterrence of the police could be achieved on collateral review, and that the *Mapp* exclusionary rule should not be applied. *Id.* at 489-95.

In the 16 years since *Stone* was decided, not once has the Court declared itself free to excise a category of claims of unconstitutional custody from the habeas jurisdiction that Congress has conferred. *See Kimmelman v. Morrison*, 477 U.S. 365 (1986) (ineffective assistance of counsel); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in selection of grand jury); *Cardwell v. Taylor*, 461 U.S. 571, 583 (1983) (Fifth Amendment claims); *Rose v. Mitchell*, 443 U.S. 5645 (1979) (racial discrimination in selection of grand jury); *Brewer v. Williams*, 430 U.S. 387 (1977) (Sixth Amendment violation by use of deliberately elicited statements).

[8] *E.g.*, *United States v. Calandra*, 414 U.S. 338 (1974) (grand jury use); *Brown v. United States*, 411 U.S. 223 (1973) (standing).

[9] *E.g.*, *Illinois v. Krull*, 480 U.S. 340 (1987) (reasonable reliance on statute); *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (deportation cases); *United States v. Leon*, 468 U.S. 897 (1984) (reasonable reliance on warrant).

[10] *United States v. Janis*, 428 U.S. 433 (1976) (civil tax suit) (decided same day as *Stone*).

Kimmelman v. Morrison, *supra*, shows the Court's unwillingness to expand *Stone* beyond its limited rationale. There, the Court held that *Stone* did not preclude habeas jurisdiction over a Sixth Amendment claim based on counsel's ineffectiveness in failing to obtain suppression of evidence seized in violation of the Fourth Amendment. The Court eschewed any power to excise unfavored claims from federal habeas jurisdiction: the Court's opinion and Justice Powell's concurrence explained that *Stone* was based on the special nature of the Fourth Amendment exclusionary rule. The Court distinguished between a Fourth Amendment exclusionary rule claim, which "is not a trial right," and a Sixth Amendment claim of ineffective assistance of counsel, which is a trial right — even when predicated on counsel's failure to raise a Fourth Amendment issue. 477 U.S. at 374. Justice Powell pointed out that before the Court in *Stone* began balancing costs against benefits, it first "reasoned . . . that the [Fourth Amendment] exclusionary rule does not exist to remedy any wrong committed against the defendant, but rather to deter violations of the Fourth Amendment by law enforcement personnel." *Id.* at 392 (Powell, J., concurring). A Sixth Amendment violation, in contrast, should be remedied on federal habeas because it strikes at "the defendant's right to a fundamentally fair trial." *Id.* at 393.

III. A HABEAS PETITIONER CONVICTED ON A CONFESSION ADMITTED IN VIOLATION OF *MIRANDA V. ARIZONA*, 384 U.S. 436 (1966), IS IN CUSTODY IN VIOLATION OF THE CONSTITUTION.

A. *Miranda*'s Holdings

The Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), which is at issue here, stands on a different footing from *Mapp v. Ohio*, 367 U.S. 643 (1961). The balancing that the Court undertook in *Stone* is misplaced when a state prisoner presents a properly preserved claim under the Fifth Amendment

self-incrimination clause and *Miranda*, which enforces that provision.

Miranda was a complex decision. It is useful to recount the series of holdings that the *Miranda* Court reached.

First, the Court held that the Fifth Amendment self-incrimination clause, not just the due process clause, applies to custodial interrogation. 384 U.S. at 460-65.

Second, the *Miranda* Court found that, in the context of custodial interrogation, a waiver of Fifth Amendment rights is invalid unless it is knowing and intelligent under the standard of *Johnson v. Zerbst*, 304 U.S. 458 (1938). 384 U.S. at 475-76.

Third, there is a right to counsel during custodial interrogation, necessary to protect the Fifth Amendment. *Id.* at 469-70.

Fourth, this right to counsel is independently subject to the knowing and intelligent waiver standard. *Id.* at 470-71.

Fifth, because of the nature of the rights involved, the inherent coercion of custodial interrogation, and the secrecy that often surrounds it, the burden is on the government to demonstrate knowing and intelligent waiver of these rights. No confessions or admissions obtained during custodial interrogation should be admitted into evidence unless the government carries this "heavy burden." *Id.* at 475.

Sixth, to carry its burden, the government must show that the defendant received the now-familiar warnings, unless some equally effective alternative means were employed to protect the defendant's rights. *Id.* at 467.

Seventh, an additional element of the government's burden of demonstrating knowing and intelligent waiver is that if the defendant invoked his right to remain silent, the government must show that this right was "scrupulously honored." 170 *Id.* at 473-74, 479.[11]

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[11] The Court further explained the meaning of this requirement in *Michigan v. Mosley*, 423 U.S. 96 (1975).

Eighth, as another element of its burden, the government must show that if the defendant invoked his right to counsel, the defendant rather than the government initiated further discussion, unless counsel was present. *Id.* at 474.[12]

Two animating considerations in the *Miranda* decision are the inherent coercion of custodial interrogation, particularly at the police stationhouse, and the often insurmountable difficulties in reconstructing what actually occurred. The decision repeatedly noted the unavailability of reliable, objective, and complete evidence about police interrogations, which "have largely taken place incommunicado. . . ." *Id.* at 445. The secrecy of such interrogations "results in a gap in our knowledge as to what in fact goes on in the interrogation rooms. . . ." *Id.* at 448. Additionally, an important reason for requiring counsel in the interrogation room is that the lawyer later can recount what happened. *Id.* at 470.[13]

The Court never has cast doubt on the validity of these concerns. In *Miller v. Fenton*, 474 U.S. 104 (1985), the Court reconfirmed its understanding that, in contrast to proceedings in court, "the critical events surrounding the taking of a confession almost invariably occur in a secret and inherently more coercive environment." *Id.* at 117.

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[12] A series of later cases, beginning with *Edwards v.Arizona*, 451 U.S. 477 (1981), explain the meaning of this requirement. *See also Arizona v. Roberson*, 486 U.S. 675 (1988); *Smith v. Illinois*, 469 U.S. 91 (1984); *Oregon v. Bradshaw*, 462 U.S. 1039 (1983); *Wyrick v. Fields*, 459 U.S. 42 (1982).

[13] Neither consideration was a fresh discovery in 1966. Over 60 years ago, the ABA's Section on Criminal Law and Criminology empaneled a committee to study the "third degree" and other police abuses. *See Report of Committee on Lawless Enforcement of Law*, 1 AM. J. POLI. SCI. 575 (1930). The committee noted, and condemned, the prevalence of "'the third degree' in the sense of rigid and severe examination of men under arrest by police officers or prosecuting attorneys . . . ." *Id.* Citing an earlier study of The Association of the Bar of the City of New York, the ABA committee noted that incommunicado pre-arraignment questioning created the "opportunity for extorting confessions in secret and by unlawful means, the use of

Miranda's rules were intended to respond to both concerns. Under *Miranda*, before the defendant's admission or confession can come in as evidence, the state must show that the inherent pressures of custodial interrogation were alleviated by the prescribed procedures. Further, proof of compliance with relatively clear-cut *Miranda* standards avoids, at least to a degree, the problem of ascertaining what actually occurred in stationhouse interrogation.

B. Differences Between *Miranda* and *Mapp*

These features of *Miranda* mark it as far different from the Fourth Amendment exclusionary rule as interpreted in *Stone*.[14]

First, the foremost function of the *Miranda* rules is to prevent the trial court from committing a present violation of a defendant's constitutional rights, through use of a compelled statement to secure a criminal conviction. The Fifth Amendment does not forbid compulsion in *obtaining* a statement, but it directly forbids such use. *Kastigar v. United States*, 406 U.S.

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which means may be subsequently denied without fear of successful contradiction." *Id.* at 578 n.8.

See Oregon v. Elstad, 470 U.S. 298, 366 (1985) (Stevens, J., dissenting) ("Even before [*Miranda*], it had been recognized that police interrogation of a suspect who has been taken into custody is presumptively coercive."); *Columbe v. Connecticut*, 367 U.S. 568, 573-74 (1961) (Frankfurter, J.) ("What actually happens . . . behind the closed door of the interrogation room is difficult if not impossible to ascertain."); *Ashcraft v. Tennessee*, 322 U.S. 143, 161 (1944) (Jackson, J., dissenting) (custodial examination is "inherently coercive"). *See generally* Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 Mich. L. Rev. 59 (1966), *reprinted in* Y. Kamisar, POLICE INTERROGATION AND CONFESSIONS: Essays in Law and Policy 41, 73-75 (1980) (discussing *Davis v. North Carolina*, 384 U.S. 737 (1966)).

[14] Because of the differences between *Mapp* and *Miranda*, balancing the costs against the benefits of enforcing *Miranda* on collateral review is inappropriate, but even if it is performed, the balancing yields a different result here than in *Stone v. Powell*. *See* pp. 21-24, *infra*.

441 (1972).[15] Thus *Miranda* requires a trial court to exclude evidence to avoid *committing* a *present* constitutional violation against the defendant him or herself. *Mapp*, in contrast, requires suppression of evidence obtained through a *past* constitutional violation, in the hope of preventing *future* constitutional violations against the people generally.

Second, the rights that *Miranda* protects are fundamental trial rights, for "the American system of criminal prosecution is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege is its essential mainstay." *Malloy v. Hogan*, 378 U.S. 1, 7 (1964).

In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the Court recognized that *Miranda*, unlike the Fourth Amendment, protects the right to a fair trial, when the Court declined to employ the knowing and intelligent waiver standard of *Miranda* to consent searches. The Court observed that "[a]lmost without exception the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial." *Id.* at 237. *Miranda*, but not the Fourth Amendment, belongs to this class of rights; "the basis for decision [in *Miranda*] was the need to protect the fairness of the trial itself." *Id.* at 240.[16]

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[15] In this sense, it can be said loosely that the Fifth Amendment, unlike the Fourth Amendment, has a "built-in" exclusionary rule. *See* Ritchie, *Compulsion That Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383, 386-93 (1977).

[16] The *Schneckloth* Court also observed that *Miranda* adopted the knowing and intelligent waiver standard because of the inherent coercion of custodial interrogation. 412 U.S. at 246-47. On the facts of *Schneckloth*, consent was given in a non-custodial setting, and the Court accordingly did not decide whether the higher waiver standard might be required when the police seek consent to search in a custodial setting. *Id.* at 240 n.29. Later cases, however, apply the same voluntariness standard under the Fourth Amendment even when the individual is in custody. *United States v. Watson*, 423 U.S. 411 (1975); *see* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 3.10, at 237 (2d ed. 1992). The distinction that supports different waiver standards in *Miranda* and *Schneckloth* is that the Fifth Amendment is one of the essential attributes of a fair and adversarial trial under our system of justice. The Fourth Amendment serves vital interests, but they "are of a wholly different order." *Schneckloth*, 412 U.S. at 242. In *Illinois v. Rodriguez*, 110 S. Ct. 2793 (1990), the Court underscored these points. It explained *Schneckloth*'s refusal to employ the knowing-and-intelligent waiver standard for consent searches on the basis of the distinction between trial rights and non-trial rights. The Fourth Amendment does not directly protect or create trial rights. What the Fourth Amendment assures "is not that no government search of [a defendant's] house will occur unless he consents; but that no search will occur that is 'unreasonable.'" *Id.* at 2798. Consequently, a knowing-and-intelligent waiver standard is out of place.

Third, the "*Miranda* rules" were not set down solely to deter police misconduct. Indeed, their principal audience is the trial courts. The police are only a secondary audience.

In this sense, the *Miranda* standards are "decision rules" for the courts. The *Miranda* standards "inform [ ] courts under what circumstances statements obtained during [custodial] interrogation are not admissible." *Minnick v. Mississippi*, 111 S. Ct. 486, 490 (1990). Secondarily, the *Miranda* standards also imply "conduct rules" for the police; they "inform [ ] police and prosecutors with specificity as to what they may do in conducting custodial interrogation." *Id.* But the impact on the police is incidental to the rules' primary function.

Miranda raised evidentiary hurdles in the form of irrebuttable presumptions for assessing whether the *Johnson v. Zerbst* waiver standard was met. *See Minnick*, 111 S. Ct. at 492 (Scalia, J., joined by Rehnquist, C.J., dissenting); *Oregon v. Elstad*, 470 U.S. 298, 307 (1985); *id.* at 364 (Stevens, J., dissenting); *New York v. Quarles*, 467 U.S. 649, 670 (1984) (O'Connor, J., concurring and dissenting). These presumptions are in principle no different from evidentiary requirements that the Court has set in a wide variety of contexts as a matter of federal constitutional law. Discrimination in jury selection is one area where the Court has established relatively rigid

evidentiary requirements — employing presumptions, and setting the level of evidence necessary to rebut them (if they are of the rebuttable variety). The Court has used such tools to give practical effect to prohibitions against discriminatory use of peremptory strikes of petit jurors, *Batson v. Kentucky*, 476 U.S. 79 (1986); *see Swain v. Alabama*, 380 U.S. 202 (1965), and against discrimination in selecting grand jurors. *Castaneda v. Partida*, 430 U.S. 482 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

The justification for the *Miranda* presumptions is fundamentally no different from that of other irrebuttable, or conclusive, presumptions.[17] Most such presumptions are employed when some impediment prevents consistently accurate case-by-case determinations of the disputed issue, or when case-specific determinations are unduly burdensome. A presumption is justified in those circumstances, "when application of the presumption . . . reach[es] the correct result most of the time." *Coleman v. Thompson*, 111 S. Ct. 2546, 2558 (1991).

The *Miranda* Court found that these ordinary requisites for a conclusive presumption were met. The Court also found an additional justification for conclusively presuming coercion. During custodial interrogation, the state, through the police, is in control. It is fully within the state's power to assure adherence to the procedures. Moreover, following the *Miranda* procedures is mostly simple and straightforward. Consequently, the *Miranda* Court rejected the sufficiency of evidence of a valid waiver, assembled after the fact. "[T]he expedient of giving an adequate warning as to the availability of the privilege so simple, [that] we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Miranda*, 384 U.S. at 468-69.

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[17] *See* Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988).

Nonetheless, in certain special settings, the Court has found that *Miranda*'s irrebuttable presumption of coercion should not apply. *Oregon v. Elstad*, 470 U.S. 298 (1985) (fruit of the poisonous tree); *New York v. Quarles*, 467 U.S. 649 (1984) (on-the-scene emergencies); *see also Michigan v. Tucker*, 417 U.S. 433 (1974) (fruit of the poisonous tree; pre-*Miranda* interrogation).

In *Elstad*, for example, the Court held that a suspect's unwarned admission, made in response to brief questioning at the moment of his arrest in his own home, did not preclude his valid waiver of his rights later when he was properly warned at the stationhouse. The Court declined to apply "cat out of the bag" reasoning to this circumstance.[18] For the Court found no violation of "the Fifth Amendment itself" in the use of Elstad's first statement, 470 U.S. at 306, finding that the statement, "though technically in violation of *Miranda*, was voluntary." *Id.* at 318.

Two of the justifications for *Miranda*'s presumption were comparatively weak on the facts of *Elstad*, as the Court viewed them. Although the setting met *Miranda*'s broad test for "custody," Elstad's initial admission was not extracted in the sort of "incommunicado interrogation . . . in a police-dominated atmosphere" that was the *Miranda* Court's central concern. There was no secret interrogation session to penetrate, and there was no specific evidence that custody itself had begotten compulsion, even in the absence of warnings.[19]

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[18] The Court stated that *Miranda* "sweeps more broadly than the Fifth Amendment itself" and "may be triggered even in the absence of a Fifth Amendment violation." 470 U.S. at 306. Such a result, of course, is inevitable with irrebuttable presumptions generally. They substitute for fact-specific determinations of disputed issues, usually because accurate fact-specific determinations too often cannot be achieved or are unjustifiably burdensome. By their nature, presumptions are apt to be over- or under-inclusive.

[19] The setting of *New York v. Quarles*, 467 U.S. 649 (1984), also was much different from the archetypal police interrogation room, or other

The rationale that most strongly supported applying an irrebuttable presumption of coercion was the ease with which the state could have avoided the presumption. The state's agents, the police, easily could have warned Elstad in his home, and the problem could have been avoided at the outset. And the Court's *Elstad* opinion nowhere questioned that *Miranda*'s irrebuttable presumption of coercion required exclusion of the initial statement itself. For this purpose, *Miranda* required the trial court to presume the statement coerced. But the Court declined to ascribe greater force to *Miranda*'s presumption than this.

Nothing in *Elstad* undercuts the fact that the trial court was obligated, as a matter of federal constitutional law, to treat Elstad's initial statements as coerced, for the purpose of excluding them from evidence. This Court stressed that it "in no way retreats from the bright line rule of *Miranda*." *Id.* at 317. Had the trial court failed to exclude the statements (and if the error was prejudicial), Elstad's custody would have violated the Constitution, and habeas corpus relief should have been available to him.[20]

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police-dominated setting where a suspect might reasonably fear abuse. *See United States v. Brown*, 557 F.2d 541 (6th Cir. 1977) (suspect in back seat of police car feared beating). Quarles was questioned briefly but without warnings at the site of his arrest in a Queens, New York, supermarket.

[20] *Quarles* was based on similar reasoning. There the Court found that a pressing public need — to find a gun secreted somewhere among the aisles of a supermarket in a crowded city — precluded giving effect to *Miranda*'s presumption of coercion in unwarned custodial interrogation. As in *Elstad*, the setting bore little resemblance to a stationhouse interrogation room, *see* n.19 *supra*, and the strongest reason for recognizing the presumption would have been the ease and simplicity of giving *Miranda* warnings. But the Court found that the need to protect the public justified the failure of the police to do so. If there had been no public emergency, the plain terms of *Miranda* would have required suppression of the suspect's statement as presumptively coerced. In that circumstance, if the state courts had erroneously admitted the statement, the defendant's custody, under the conviction and sentence that resulted, would have violated the Constitution, and habeas corpus should have been available.

IV. THE BENEFITS OF ENFORCING *MIRANDA* ON HABEAS CORPUS OUTWEIGH THE COSTS.

For the reasons just explained, the balancing that the Court conducted in *Stone* is not appropriate for a *Miranda* claim. But even if it were, the balance tips differently here than in *Stone*.

Stone v. Powell was a careful and considered opinion. The Court's balancing of costs and benefits from enforcing *Mapp* on collateral attack was exacting. Similarly careful balancing, taking account of the substantial differences between *Mapp* and *Miranda*, leads to the opposite result here than in *Stone*.

To begin with, the benefits of enforcing *Miranda* "are of a wholly different order" from the Fourth Amendment interests at issue in *Stone*. *Schneckloth*, 412 U.S. at 241. In *Stone*, the Court saw virtually no benefit from enforcing *Mapp*, since no additional police deterrence could be achieved. The Court concluded that it would make negligible difference in future police behavior if, perhaps years after the fact, a federal judge declared an officer's conduct in violation of the Fourth Amendment. *Stone*, 428 U.S. at 493-94. No policy of our adversarial system requires suppressing evidence obtained in a prior illegal search. Indeed, in the Court's view in *Stone*, the *Mapp* exclusionary rule and our accusatorial-adversarial system are themselves in conflict. *Id.* at 489-90.

Custody upon a conviction resting on presumptively coerced statements is entirely different. Providing relief from such custody safeguards the habeas petitioner's right to a fair and adversarial trial. For enforcing *Miranda* assures that the petitioner's custody is not in violation of the Fifth Amendment — a mainstay of our adversarial system. Moreover, admission of coerced confessions — even "presumptively" coerced confessions — entails risks of conviction on unreliable evidence that simply are not present when the police have seized tangible evidence, even if they did so illegally. The hazards of confessions are well known, and coerced confessions always pose

risks of unjust conviction. *Miranda*, 384 U.S. at 455 n.24. It is safe to assume that physical evidence seized in violation of the Fourth Amendment nearly always is reliable; at any rate, the legality *vel non* of its acquisition has nothing to do with reliability. *Stone*, 428 U.S. at 490.

Moreover, one important goal of federal habeas is to promote state court adherence to the requirements of federal law. *Butler v. McKellar*, 110 S. Ct. 1212, 1217 (1990); *Teague v. Lane*, 489 U.S. 288, 306-07 (1989) (O'Connor, J.). Retaining habeas jurisdiction over *Miranda* claims will serve this goal. The *Miranda* rules for admission of confessions are comparatively few in number and simple, even rigid. *See, e.g.*, *Minnick v. Mississippi*, 111 S. Ct. 486, 490 (1990). Moreover, the need to apply them correctly is recurring. When the state courts have departed from those rules, federal intervention is likely necessary to correct a basic misunderstanding of federal law, which, unless corrected, will recur. Moreover, federal courts regularly face the same problems in applying *Miranda* as do state courts. The review of *Miranda* claims by life-tenured federal judges fully comports with the bedrock duty of the federal judiciary to protect and enforce federal rights, and such review is squarely within federal judges' competence.

On the other side of the ledger, the incremental cost of retaining federal habeas jurisdiction over *Miranda* claims is comparatively slight. The sorts of costs that the Court could avoid by excluding search and seizure claims from habeas corpus cannot so easily be avoided in the confession arena.

Miller v. Fenton, *supra*, would require the federal courts to continue to review confession claims *de novo*, but under the due process clause rather than *Miranda*.[21] As the present case

[21] This would be the result of a decision excising from habeas jurisdiction all claims predicated on any aspect of the *Miranda* decision. *Miranda*, of course, fashioned several rules, *see* pp. 13-14, *supra*, and some intermediate position can be imagined. For example, *Miranda*-based claims that the petitioner did not make a knowing and intelligent waiver still might be heard — but without benefit of *Miranda*'s irrebuttable presumptions. Under any such scheme, as under a complete excision of *Miranda* from § 2254(a), the federal courts would remain in the business of assessing the admissibility of confessions, and benefits in the form of reduced federal-state friction and increased finality of convictions would be small.

well illustrates, in many cases *Miranda* claims and voluntariness claims can be made side-by-side. Federal-state friction in confession issues would not be eliminated by eliminating *Miranda* from habeas; only the contact point would be moved.

Indeed, assessing the admissibility of confessions under a totality-of-the-circumstances test can be more intrusive than assessing compliance with the comparatively few and fixed *Miranda* rules. The voluntariness determination requires the federal habeas court to determine, with far less specific guidance than *Miranda* provides,

> whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means . . . .

Miller v. Fenton, 474 U.S. at 116.

The due process test surely is more burdensome on the federal courts. As the Court observed in *Schneckloth*, "[t]he significant fact about [the Court's pre-*Miranda* due process confession decisions] is that none of them turned on the presence or absence of a single criterion; each reflected a careful scrutiny of all the surrounding circumstances." 412 U.S. at 226.[22]

[22] The Court in *Miller* also acknowledged that "[t]he voluntariness rubric has been variously condemned as 'useless'; 'perplexing'; and 'legal "double-talk."'" 474 U.S. at 116 n.4 (citations omitted). Whatever the justice of this condemnation, the voluntariness standard undeniably is far more burdensome to apply, and less predictable in outcome, than *Miranda*.

In contrast, *Stone v. Powell*, by excluding unadorned *Mapp* claims from habeas jurisdiction, virtually excluded search and seizure issues. No such result is possible here as to confessions.

For the same reason, extending *Stone* to *Miranda* would not promote finality of convictions to any comparable degree as did *Stone*. Confession claims still would be made, but under a due process rather than *Miranda* heading. Indeed, the greater complexity of the due process/voluntariness standards for confessions would breed greater uncertainty as to the finality of convictions.

Even if a balancing test is employed — and we believe it should not be — excising *Miranda* claims from federal habeas corpus jurisdiction is unjustified. The same analysis that the Court employed in *Stone* as to claims under *Mapp* yields a different result here.

CONCLUSION

For the foregoing reasons, this Court should reaffirm that federal habeas corpus jurisdiction extends to claims of state prisoners that they were convicted upon confessions compelled under the standards of *Miranda v. Arizona*, 384 U.S. 436 (1966).

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Respectfully submitted,

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